2002

State of Utah v. Rehan Hassan : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
REHAN HASSAN,	:	Case No. 20020885-SC
Defendant/Appellant.	:	

BRIEF OF APPELLEE

Appeal From Two Convictions for Aggravated Burglary, First Degree Felonies, in Violation of UTAH CODE ANN. § 76-6-203 (1999), and Three Convictions for Assault, Class B Misdemeanors, in Violation of UTAH CODE ANN. § 76-5-102 (1999), in the Third Judicial District Court, Salt Lake County, Utah, the Honorable Michael K. Burton, Presiding

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JURISDICTIONAL STATEMENT

Defendant appeals from two convictions for aggravated burglary, first degree felonies, in violation of UTAH CODE ANN. § 76-6-203 (1999), and three convictions for assault, class B misdemeanors, in violation of UTAH CODE ANN. § 76-5-102 (1999). This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-2(3)(i) (2002).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

1. Though defendant conceded below that he voluntarily and knowingly waived his right to a jury trial, has he nevertheless established that the trial court plainly erred in accepting the waiver without explaining the jury selection process?

Defendant did not advance this theory below and, therefore, consideration of its merits for the first time on appeal is precluded unless defendant demonstrates plain error, that is,

that the trial court obviously erred in accepting defendant's otherwise undisputed voluntary and knowing jury waiver without informing him of the jury selection process, and that, absent the error, there exists a reasonable probability that the outcome of the trial would have been more favorable to defendant. ***See State v. Casey***, 2003 UT 33, ¶ 41, 488 Utah Adv. Rep. 14 (reaffirming that obvious prejudicial error may be considered for the first time on appeal). ***See also Davis v. Grand County Service Area***, 905 P.2d 888, 891-92 (Utah App. 1995) (applying the "more rigorous" plain error standard to review "a completely differen theory" than argued in a motion for new trial).

2. Has defendant established that the court plainly erred in allowing him to represent himself during the motion for new trial evidentiary hearing after defendant asked to proceed *pro se* and refused the assistance of competent and conflicts-free appointed counsel?

Where a defendant expressly declines an offer of counsel, "he has the burden of showing by a preponderance of the evidence that he did not so waive his right to counsel." ***State v. Arguelles***, 2003 UT 1, ¶ 74, 63 P.3d 731. ***Accord State v. Bakalov***, 1999 UT 45, ¶ 22, 979 P.2d 799. Because defendant did not object when the court permitted him to proceed *pro se*, he must now establish that the court plainly erred in concluding that his waiver of counsel was voluntary and knowing. ***See Casey***, 2003 UT 33, ¶ 41.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The following rule is reproduced in its entirety in *Addendum A*, together with any other provision cited in argument:

UTAH R. CRIM. P. 17(c) - All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

STATEMENT OF THE CASE

On June 8, 1999, defendant was charged in Third District Court Case No. 991911407 [#1407] with two aggravated burglaries arising from illegal entries into Carol and J.D. Miller's apartment on May 29, 1999 (R1407: 2-4). In the same information, defendant was charged with three misdemeanor assaults for his subsequent assaults on Carol and J.D. and a June 3, 1999, assault on Kathy Harris at the same apartment complex (id.). A month later, defendant was charged in Third District Court Case No. 991915044 [#5044] with aggravated burglary based on a third illegal entry into the Millers' apartment on May 29 (R5044: 1-3). Following separate preliminary hearings, the cases were consolidated for trial (R1407: 12-13; R5044: 62-63).[1]

Defendant waived his right to a jury trial (R1407: 92-93; R5044: 106; R456: 3-8).[2] *See Addendum B (Jury Waiver Colloquy).* On May 15-16, 2000, Judge Anne Stirba

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[1] The State cites to the pleadings in case #1407 as R1407: page # and in case #5504 as R5044: page #. Citation to the consolidated hearing/trial transcripts are by external record number followed by internal page, i.e., R454: 1.

[2] During the hearing on the motion for new trial, defendant conceded and the court concluded that defendant voluntarily and knowingly waived jury trial (R454: 29 & 144). *See Addendum E (Findings, Conclusions, and Denial of Motion for New Trial).* Defendant does not challenge this ruling on appeal, but argues that Utah law requires an explanation of the jury selection process before a waiver may be accepted (*Brief of Appellant [Br.Aplt.] at 1-2 & Point I*). Defendant is entitled to raise a claim for the first time on appeal under the plain error doctrine, but is bound by the lower court's unchallenged findings and conclusions. ***See Davis***, 905 P.2d at 890.

conducted a bench trial, during which defendant was represented by appointed counsel, Edward Montgomery (R1407: 94-100; R5044: 120-22). Judge Stirba concluded that the evidence failed to establish that defendant possessed a gun during one of the illegal entries and acquitted defendant of Count I in #1407 (R1407: 99-100, 182). ***See*** *Addendum C (Findings, Conclusions, and Order of Conviction).* The judge found defendant guilty of the remaining five charges (R1407: 99-105, 282-87; R5044: 123, 127-32). ***See*** *Add. C.* On July 18, 2000, defendant was sentenced to two terms of five-years-to-life imprisonment on the felonies and three terms of six months incarceration on the misdemeanors, all sentences to run concurrently (R1407: 204-05; R5044: 148-49).

Defendant privately retained Mary Corporon, who filed a motion for new trial which alleged that trial counsel (Montgomery) was ineffective in failing to call a locksmith as an expert witness and that an "alibi" witness, defendant's former girlfriend Maleena Tu Phan, was located four days after trial (R1407: 202, 211-16; R5044: 143-47).[3] Before the motion was heard, defendant elected to proceed *pro se* (R1407: 296, 304-05, 370-72, 399, 409-10; R204: 9-10; R449: 5-6, 11, 16-21; R452: 12-13; R453: 3-8; R455: 2-15; R457: 6-9).

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[3] Defendant referred to Maleena as an "alibi" witness, but the court, in denying the motion for new trial, found that because defendant admitted he was at the Millers' apartment, Maleena did not provide an "alibi" (R1407: 423-24; R5044: 198-99; R454: 115-18). ***See*** *Add. E.* Moreover, her proffered testimony did not exculpate defendant because she heard defendant arguing with a woman, but did not otherwise know what occurred (id.). Defendant does not challenge the court's findings and conclusions on appeal.

Prior to proceeding *pro se*, defendant retained, was appointed, or was offered the services of nine attorneys. David Grindstaff was initially appointed and represented defendant through preliminary hearing (R1407: 10-13). Mr. Grindstaff withdrew when defendant privately retained Ron Yengich, who represented defendant through pretrial conference (R1407: 25-40; R5044: 19-42). Mr. Yengich negotiated an "extremely good" plea offer, but defendant accused him of being an "undercover jew" and of conspiring against him because he was Muslim (R1407: 41, 310, 345-46). Mr. Yengich withdrew based on "irreconcilable differences" (R1407: 42, 45; R5044: 46-48).[4] Paul Quinlan of the Salt Lake Legal Defender Association (LDA) was appointed, but withdrew because LDA represented Carol Miller, a victim in this case, in a pre-existing misdemeanor assault on her husband (R1407: 71-73, 77-86). Conflicts-counsel Edward Montgomery was then appointed and represented defendant through trial (R1407: 86-100; R5044: 64-122). Prior to sentencing, Mr. Montgomery withdraw when his relationship with defendant "completely deteriorated" (R1407: 176-77, 297-98; R5044: 142; R448: 3-4).[5] Defendant privately retained Mary Corporon, who represented defendant at sentencing and filed the motion for new trial (id.).

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[4] Defendant persistently denounced Mr. Yengich as an "evil person . . . an enemy of Islam," who "totally betrayed" him and "totally messed up" his case; however, defendant did not claim in his motion for new trial and does not claim on appeal that Mr. Yengich was ineffective (R1407: 345-46; R449: 5, 12-13).

[5] In his motion for new trial, defendant alleged that Montgomery was ineffective (R1407: 211-16; R453: 11-13). The court concluded that he was not (R1407: 420-24; R5044: 195-99). ***See Add. E.*** Defendant has not challenged the court's findings or conclusions on appeal.

Eventually, Ms. Corporon moved to withdraw based on ethical considerations and defendant's refusal to cooperate with her (R1407: 260-61; R448: 10-12; Exhibit 3).[6] Heidi Buchi (LDA) was appointed, but withdrew due to a conflict, and conflicts-counsel Stephen McCaughey was appointed (R1407: 287-94). Mr. McCaughey reviewed the pleadings, the findings in support of the verdict, and the new trial motion and memoranda; he did not review the trial transcripts because they were not yet prepared (R449: 3). After Mr. McCaughey arranged for the trial transcription, he withdraw due to "irreconcilable differences" with defendant (R1407: 296-300).[7]

Defendant never objected to the withdrawal of his attorneys. According to defendant, the attorneys were attempting to "override" his decisions (R204: 9-10, R449: 4-6). He

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[6] Defendant believed Ms. Corporon tried to unduly "silence" him when she criticized his wife's contacts with Judge Stirba and the judge's husband and when she warned defendant that his denunciations of Mormons and other "enemies of Islam" would backfire (R1407: 345-46; R449: 5; Exhibit 3). While defendant was upset with Ms. Corporon, he did not allege her ineffectiveness below or on appeal.

[7] Defendant speculates that Mr. McCaughey was unprepared to proceed on the motion for new trial (*Br.Aplt. at 28 & n.6*). While it is true that the trial transcripts were not yet prepared, this does not support defendant's claim that Mr. McCaughey was unfamiliar with the relatively simple facts of the case. In moving to withdraw, Mr. McCaughey explained that he had reviewed various documents relevant to the new trial motion and concluded that the motion was not likely to succeed; when he expressed this view to defendant, defendant asked him to withdraw (R449: 3, 9). Defendant asserted that he asked Mr. McCaughey to withdrew because he was "unduly influenced" by defendant's "enemy," Mr. Yengich (R449: 5). ***See supra, n.4***. Defendant did not allege in his motion for new trial that Mr. McCaughey was ineffective and has not raised an ineffectiveness claim on appeal.

acknowledged that he could get along with them if they did what he wanted, but admitted that he was difficult (R204: 9-10; R455: 8).

After Mr. McCaughey withdrew, defendant asked to represent himself (R1407: 296, 304-05, 370-72, 399, 409-10; R204: 9-10; R449: 5-6, 11, 16-21; R452: 12-13; R453: 3-8; R455: 2-15; R457: 6-9). Defendant wanted assistance in subpoenaing his prior counsel as witnesses for the hearing on the new trial motion, but otherwise believed he was capable of representing himself (R1407: 304-05; R449: 4-11). After conducting a ***Frampton***-type colloquy[8], the court permitted defendant to proceed *pro se*, but appointed LDA as standby counsel (R449: 16-20). ***See*** *Addendum D (Self-Representation Colloquies).*

LDA subsequently withdrew and Richard Mauro, conflicts-counsel, was appointed (R1407: 353). Mr. Mauro hired an investigator to locate Maleena and other witnesses necessary for the new trial hearing (R1407: 396-98). Mr. Mauro borrowed defendant's copy of the trial transcripts, which had been delivered to defendant at the prison based on his *pro se* status (R1407: 343, 396-98). Mr. Mauro was in the process of subpoenaing witnesses and preparing for hearing when defendant filed a complaint with the Utah State Bar accusing him of stealing the transcripts (R1407: 396-98). Consequently, Mr. Mauro withdrew from the case (id.).[9] Defendant told the court that Mr. Mauro's withdrawal made little difference to

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[8] ***State v. Frampton***, 737 P.2d 183, 188-89 (Utah 1987) (recommending that a trial court conduct a sixteen-point colloquy before permitting a defendant to represent himself in a criminal trial).

[9] Mr. Mauro filed an affidavit which explained his preparation and the circumstances surrounding his use of defendant's transcripts (R1407: 396-98). Other

his preparation because Mr. Mauro was only stand-by counsel; defendant was ready to proceed *pro se* and only needed assistance in subpoenaing his witnesses (R1407: 399).

Three days after Mr. Mauro withdraw, the court offered to appoint another conflicts attorney, Manny Garcia (R455: 2-10). Hearing on the motion for new trial had previously been set for the same day, but the court was willing to continue the hearing to allow Mr. Garcia time to prepare (id.).[10] Defendant objected and insisted that he could proceed without Mr. Garcia's assistance as long as subpoenas were issued for his witnesses (id.). The court agreed to help defendant secure his witnesses, and then questioned him on whether he still wished to proceed *pro se* (R455: 6-27). ***See*** *Add. D.* Defendant did (id.).[11]

At his own request, defendant proceeded to lay "foundation" for his motion exhibits and outline his new trial arguments in anticipation of the evidentiary hearing, which was continued until defendant's witnesses could be subpoenaed (R455: 44-54).[12] In setting out

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than the bar complaint, defendant has not claimed below or on appeal that Mr. Mauro was ineffective.

[10] Defendant's assertion that the court forced him to proceed that day (*Br.Aplt. at 35 n.9*), has no record support. ***See*** *Add. D (R455: 2-15).*

[11] On appeal, defendant insinuates that Mr. Garcia was neglectfully unprepared and this caused defendant to proceed *pro se* (*Br.Aplt. at 34-35*). Below, defendant never claimed this. In fact, he was apologetic to Mr. Garcia for refusing his assistance and assured him that his refusal had nothing to do with Mr. Garcia personally (R455: 6-11). He just felt that any new attorney would need three months to prepare and defendant believed he was ready to proceed once his witnesses were subpoenaed (id.).

[12] Defendant asked to proceed in this fashion because he wanted the court to review his exhibits before the hearing (R455: 49).

his argument, defendant quoted rule 24, Utah Rules of Criminal Procedure, governing motions for new trial, and acknowledged its limitations (R455: 17-71). ***See*** *Addendum A (Cited Provisions).* The court noted that defendant evidenced an understanding of court procedures (R455: 15).[13]

During the subsequent evidentiary hearing, defendant continued to represent himself (R454: 4). He called as witnesses his former trial counsel, Mr. Montgomery; Nathan Pace, Mr. Montgomery's conflicts-contract associate; Detective Burningham, the investigating officer; and Mr. Paul Parker, the trial prosecutor (R454: 7-132). He also proffered the testimony of Maleena, his missing witness, and submitted his exhibits (id.). Defendant extensively argued the motion for new trial, gaining the praise of the court for his reasonable presentation (R454: 136-48, 164-68). Nevertheless, the court denied it. Specifically, the court found and concluded that (1) defendant knowingly and voluntarily waived his right to a jury trial and his counsel, Mr. Montgomery, legitimately concurred in defendant's decision; (2) Mr. Montgomery conducted adequate pretrial investigation and legitimately chose not to present an expert locksmith or character witnesses; (3) Mr. Montgomery conducted an active and viable defense and, despite its lack of success, provided defendant with effective

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[13] At various times, defendant expressed his understanding that: a discretionary standard applied in reviewing a motion for new trial; the pending new trial motion needed to be resolved before he could appeal; trial error must substantially impact a verdict to justify a new trial; if Judge Stirba had lived, she would have been in a better position than the judge assigned to the motion to access the impact of any "newly discovered" evidence since she observed the trial witnesses; and if the victims were believed, the evidence was sufficient to support the convictions (R1407: 119; R455: 22-24).

representation at trial; (4) even if Maleena had been located prior to trial, her testimony did not provide an "alibi" for defendant and was cumulative of other evidence presented at trial; and, therefore, (5) there was no basis upon which to grant defendant a new trial (R1407: 419-26; R5044: 194-201). ***See Add. E.***

At defendant's request, LDA was appointed to represent defendant on appeal (R454: 168). A timely notice of appeal was filed (R1407: 458-74).

On appeal, defendant does not challenge the sufficiency of the evidence to support the verdicts or the denial of his motion for new trial. Instead, defendant advances arguments which were neither raised nor preserved below. Defendant acknowledges that for this Court to consider the arguments, he must establish plain error (*Br.Aplt. at 1-2*).

STATEMENT OF FACTS[14]

Defendant admitted that around May 29, 1999, the electricity to his apartment was cut off by the power company for non-payment (R450: 158-60). Without authorization, he ran an extension cord from his apartment to a common basement laundry room where he plugged the cord into power outlets belonging to the apartment complex (R450: 161). Carol and J.D. Miller lived across the hall from defendant (R450: 21-22). The Millers were not the apartment managers, but received a discount on their rent to watch the building. When J.D.

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[14] Though he does not challenge the sufficiency of the evidence to support his convictions, defendant argues that the Millers' testimony was inconsistent and, therefore, any error is necessarily prejudicial (*Br.Aplt. at 23*). The State summarizes the evidence in the light most favorable to the verdicts. ***See State v. Nichols***, 2003 UT App 287, ¶ 1, n.1, 76 P.3d 1173.

Miller saw the extension cord in the laundry room, he unplugged it, but did not confront defendant (R450: 92-93). ***See*** *Add. C, Findings 1-7.*

Later that day, defendant and his then-girlfriend, Maleena, went to his apartment and discovered no power (R450: 163-66). Defendant assumed the Millers had interfered with the extension cord (R450: 166-67). He was upset because he felt that neighbors should take care of neighbors (id.). ***See*** *Add. C, Findings 8-9.*

Defendant admitted that he went to the Millers' apartment, Carol answered the door, and a verbal argument ensued (R450: 167-70, 183). After Carol closed the door, defendant admitted he kicked the door several times in frustration (id.). ***See*** *Add. C, Findings 8-12.*

What occurred next was disputed. According to defendant, he simply went back to his apartment and had no more interaction with the Millers (R450: 170). Five days later, he testified that Kathy Harris, the wife of the apartment manager, and Carol went to defendant's apartment to discuss his unauthorized use of the building's electricity (R450: 173-74). An extension cord was running from defendant's front door into a hallway electrical outlet (R450: 113-14, 174). Kathy told defendant that he could not use the building's power (R450: 175). According to defendant, Kathy then reached inside his door to unplug the cord (id.). He pushed her back (R450: 176). Kathy called the police and he was arrested (R450: 177).

The Millers and Kathy Harris described a different scenario. The Millers testified that on May 29, defendant kicked in their front door and illegally entered their apartment three times, assaulted Carol twice and J.D. once, and threatened to kill them if they called the

police (R450: 10-40, 96-99).[15] They did not immediately report the burglaries or assaults to the police because the Millers and defendant were the only tenants in the building and the Millers had no telephone (R450: 87, 100, 125). Moreover, defendant was 29 years old, 6' 2", and weighed 160 pounds (R450: 178). Carol Miller was almost sixty and weighed only 88 pounds (R450: 27). Additionally, the Millers felt their injuries were minor and J.D. was able to fix the damaged door (R450: 81, 104). ***See** Add. C, Findings 12-26.*

On June 3, Carol reported defendant's unauthorized use of the building's electricity to Kathy Harris (R450: 113). Kathy and Carol went to defendant's apartment and confronted him (id.). Kathy testified that she did not reach into defendant's apartment—she only attempted to unplug the extension cord from the outlet in the building's hallway (R450: 113-17). When she bent down, defendant hit her in the mouth, pushed her up against the Millers' door, grabbed her hair, and kicked her "a lot" of times (R450: 117). ***See** Add. C, Findings 27-38.* Unlike the Millers, Kathy immediately reported the incident to the police (R450: 123-24). When the police arrived, the Millers told them of the assaults and burglaries five days earlier (R450: 123-25).

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[15] Carol also testified that defendant displayed a gun, but J.D. never saw a weapon (R450: 39, 99). A realistic gun-shaped cigarette lighter was found in defendant's vehicle (R450: 138-39). The trial court concluded that the evidence did not establish that defendant possessed a gun during any of the illegal entries and acquitted defendant of Count I, Case #1407 (R1407: 184, 187; R5044: 129, 132).

SUMMARY OF ARGUMENT

Waiver of Jury Trial: During the hearing on the motion for new trial, defendant conceded and the court concluded that defendant knowingly and voluntarily waived his right to a jury trial. Nevertheless, defendant now claims that the trial court plainly erred in accepting the waiver because it did not follow the procedure of the United States Court of Appeals for the Seventh Circuit, which requires an explanation of the jury selection process before a waiver is accepted. At the same time, defendant acknowledges that Utah has not yet adopted the Seventh Circuit requirement. His acknowledgment necessarily defeats his claim of obvious error. Moreover, even in jurisdictions which follow the Seventh Circuit rule, failure to follow the rule does not result in automatic reversal. Instead, the appellate court looks to the totality of the circumstances surrounding the jury waiver to determine if it was otherwise knowing and voluntary. Here, defendant conceded below that it was.

Waiver of Counsel re Motion for New Trial: Defendant was offered multiple competent and conflict-free counsel to assist him with his motion for new trial, but ultimately chose to proceed *pro se*. Two judges questioned him on two different occasions concerning his choice. Both concluded that defendant's waiver of his right to counsel was voluntary and knowing. Defendant has not established that any alleged deficiencies in those colloquies plainly negated the validity of his waiver.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN ACCEPTING DEFENDANT'S WAIVER OF A JURY TRIAL WITHOUT INFORMING HIM OF THE JURY SELECTION PROCESS

During the evidentiary hearing on defendant's motion for new trial, the prosecutor and later the court questioned defendant's former trial counsel (Montgomery) about the circumstances surrounding defendant's waiver of a jury trial (R454: 50 & 56-57). Counsel testified that defendant first suggested a bench trial because he was concerned that a Utah jury would be less inclined to believe a Muslim Pakistani national, like himself, and more likely to credit white Americans, like the Millers and Harris (id.). While defendant believed this was arose from inherent racism, he also recognized that people will often more readily believe individuals similar to themselves (R1407: 53, 56A, 325). Two of defendant's attorneys (Grindstaff and Montgomery) believed Judge Stirba, the trial judge, was strict, but a non-racist, who hated liars—a bias beneficial to defendant's theory that the victims were lying (R1407: 311). Defendant had observed the judge and felt she was fair (R1407: 119, 345). Consequently, defendant stated that he

> planned, based on the way I planned the case, the way I evaluated the case, I planned to go ahead for the [bench] trial based on what I though information would be brought up, and I evaluated it, based on that information, there would be a reasonable doubt, very clearly, a reasonable doubt in the mind of Judge Stirba that this thing did not happen.

(**R454:** 29). Defendant conceded that

> I picked the judge and the jury, of course, it was my decision to pick the judge, because I felt she would treat me–she would be more fair to me.

(**R454:** 144). In denying the motion for new trial, the court found that defendant's decision to waive the jury was done with the legitimate concurrence of his trial counsel and concluded that the waiver was voluntary and knowing (R1407: 420-21 & 423; R5044: 195-96 & 198). ***See*** *Addendum E (Findings and Conclusions - Denial of Motion for New Trial).*

Defendant does not challenge this ruling on appeal. Instead, for the first time, he claims that the trial court plainly erred in accepting the jury waiver because it did not follow the procedure of the United States Court of Appeals for the Seventh Circuit and explain the jury selection process to defendant (*Br.Aplt. at 1-2 & 15*). The argument is without merit.

(A) The Trial Court Fully Complied with Utah Procedure in Accepting Defendant's Waiver.

Rule 17(c), Utah Rules of Criminal Procedure, directs that all felony cases will be tried by jury "*unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution*" (emphasis added). ***See*** *Addendum A (Cited Provisions).* Here, it is undisputed that the trial court fully complied with the rule (R456: 5-8). ***See*** *Addendum B (Jury Waiver Colloquy).* Utah has no other mandated procedure governing jury waiver. Consequently, Utah procedural rules provide no predicate for defendant's claim of obvious error.

(B) The Trial Court Properly Concluded that Defendant Knowingly and Voluntarily Waived His Right to a Jury Trial.

Because the right to a jury trial is constitutional, its waiver must be knowing and voluntary. ***Patton v. United States***, 281 U.S. 276, 312 (1930); ***State v. Moosman***, 794 P.2d 474, 476-77 (Utah 1990). Utah requires the waiver to be in open court, but does not mandate a set colloquy. ***See*** UTAH R. CRIM. P. 17(c). Instead, the validity of a jury waiver is judged by the totality of its surrounding circumstances. ***Moosman***, 794 P.2d at 478-79.

Here, the trial court conducted a colloquy with defendant to determine if his decision to waive a jury was knowing and voluntary. ***See*** *Add. B.* Defendant had previously discussed the advantages and disadvantages of a jury trial with his trial counsel (R1407: 420-21; R5044: 195-96; R456: 6-7). ***See*** *Add. B & E.* Defendant understood that he had a constitutional right to a jury of eight persons, whose verdict must be unanimous (R456: 5-7). He knew that if he waived the jury, only the judge would decide the outcome of the case (R456: 5-6).[16] Several times, the court asked defendant if he was freely choosing to waive a jury and if he had any questions about the waiver (R456: 6-7). Each time, defendant

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[16] Defendant correctly notes that the court was somewhat tongue-tied in describing its role: "Do you understand that a jury doesn't hear the evidence in this case, that it is tried to me as a judge?" (R456: 7). However, the court immediately clarified its question:

> Q: And that I will be the only person making the decision on the guilt or innocence; do you understand?
>
> A: Absolutely.
>
> Q: And is that what you want to have happen?
>
> A: Yes, Your Honor.

(id.)

assured the court his choice was voluntary and knowing (id.). When defendant offered to explain why he wanted to waive a jury, the judge injected that she was "not trying to talk [him] out of it or into it" (R456: 6).[17]

Judge Stirba's conclusion that defendant's jury waiver was knowing and voluntary was ultimately substantiated by defendant when he admitted, during the hearing on the motion for new trial, that he weighed the alternatives, but chose a bench trial (R454: 29, 50, 56-57, 144). Additionally, it was validated by Judge Burton when, in denying the motion for new trial, he found and concluded that "defendant's decision to waive the jury was a clear and informed choice" (R1407: 421-22 & 423; R5504: 195-96 & 198). ***See*** *Add. E.* Defendant fails to acknowledge his admissions and does not challenge the new trial findings and conclusions. Consequently, but for the rule defendant now proposes, it is undisputed that defendant voluntarily and knowingly waived a jury trial.

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[17] Defendant argues that his concern that jurors might be inherently racist undercuts the validity of his jury waiver; he also argues that the court was obligated to ask for and consider his reasons for waiving (*Br.Aplt. at 18-19 & 21*). Case law is contrary. A defendant's fear of undetected jury bias or prejudice is a common and accepted reason to waiver a jury. ***See Taylor v. Warden***, 905 P.2d 277, 284 (Utah 1995) (recognizing that law-trained judges more readily disregard personal beliefs than jurors and, thus, choosing a judge over a jury is almost always a legitimate choice); ***State v. Maguire***, 529 P.2d 421, 422 n.1 (noting that fear of racism is a legitimate reason to waive a jury). ***See also Singer v. United States***, 380 U.S. 24, 35 (1965) (recognizing that despite safeguards in the jury selection process, a jury trial necessarily contains inherent weaknesses and the "potential for misuse"); ***Adams v. United States***, 317 U.S. 269, 278 (1942) (recognizing that "[i]n a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes").

(C) The Trial Court Was Not Obligated to Follow Seventh Circuit Court of Appeals Procedure Before Accepting Defendant's Waiver.

Plain error must be predicated on controlling authority. ***See State v. Dunn***, 850 P.2d 1201, 1208-09 (Utah 1993) (recognizing that plain error requires error which is both obvious and prejudicial); ***State v. Verde***, 770 P.2d 116, 122 n.11 (Utah 1989) (explaining the obviousness prong of plain error). Here, defendant acknowledges that Utah law does not mandate the rule he advocates (*Br.Aplt. at 12*). Consequently, defendant's claim of plain error necessarily fails. ***See Id.***

Moreover, even if this Court were to provide prospective guidelines for jury waiver colloquies, defendant overstates the Seventh Circuit rule he advocates.

The so-called ***Delgado*** rule directs federal district courts within the Seventh Circuit to "explain that a jury is composed of twelve members, that the defendant may participate in the selection of jurors, and the verdict of the jury is unanimous" before accepting a waiver of a jury trial. ***United States v. Delgado***, 635 F.2d 889, 890 (7th Cir. 1981). Contrary to defendant's characterization, this procedure is not constitutionally required, but only judicially recommended. ***See Id. and United States v. Rodriguez***, 888 F.2d 519, 527 (7th Cir. 1989); ***Williams v. DeRobertis***, 715 F.2d 1174, 1177-78 (7th Cir. 1983), *cert. denied*, 464 U.S. 1072 (1984) (both recognizing that ***Delgado*** rule arose from judicial prudence and not constitutional necessity). ***See Singer***, 380 U.S. at 36; ***Adams***, 317 U.S. at 277 (both refusing to impose strict procedural guidelines regarding jury waiver). If a district court does not provide the recommended explanations, the Seventh Circuit Court does not presume

prejudice. Instead, the appellate court reviews the totality of the circumstances surrounding the waiver to determine if, despite the failure to follow ***Delgado***, the jury waiver is otherwise voluntary and knowing. ***See Rodriguez***, 888 F.2d at 528; ***Williams***, 715 F.2d at 1177-81. ***See also Marone v. United States***, 10 F.3d 65, 67 (2d Cir. 1993); ***United States v. Robertson***, 45 F.3d 1423, 1431 (10th Cir. 1995); ***State v. Mitchell***, 15 P.3d 314, 320 (Hawai'i 2000); ***State v. Foote***, 821 A.2d 1072, 1074 (N.H. 2003) (all acknowledging that there is no set constitutional requirement for a voluntary and knowing jury waiver and, consequently, whatever procedure is recommended or followed, a totality of the circumstances standard ultimately applies).

Here, the trial court explained that a Utah jury would consist of eight members, whose verdict was required to be unanimous. ***See*** *Add. B.* The trial court did not further explain the jury selection process to defendant, though subsequently, in denying the motion for new trial, the motion court found that "[d]efendant and Mr. Montgomery discussed the difficulties and benefits of a bench trial as compared to a jury trial . . . [and d]efendant decided that Judge Stirba would be more favorable than a jury that would not likely be able to relate to defendant's background and beliefs" (R1407: 420-21; R5044: 195-96). ***See*** *Add. E.* Based on this finding, the motion court concluded that with the advise of counsel, defendant made a "clear and informed choice" to waive a jury (R1407: 423; R5044: 198). ***See*** *Add. E.* ***See also Williams***, 715 F.2d at 1181 (noting additional validity given jury waivers made with the

assistance of counsel). Defendant has not acknowledged, much less challenged, the lower court's findings and conclusions establishing the validity of his jury waiver.

Consequently, even if, arguendo, Utah prospectively adopted a ***Delgado***-type rule, it would not change the outcome in cases like this, where the record establishes the voluntary and knowing nature of the waiver.[18]

POINT II

THE COURT PROPERLY PERMITTED DEFENDANT TO PROCEED *PRO SE* DURING THE HEARING ON THE MOTION FOR NEW TRIAL AFTER HE REJECTED COMPETENT AND CONFLICT-FREE COUNSEL

Defendant privately retained, had appointed, or was offered the services of multiple experienced and competent counsel. But for LDA, they were all conflict-free at the time of their appointment. ***See*** *Statement of the Case, supra.* David Grindstaff withdrew because defendant retained Ron Yengich. Two LDA attorneys withdrew in the pretrial stages because they represented one of the victims in a separate case; one LDA attorney withdrew in connection with the motion for new trial based on an unspecified conflict with defendant.

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[18] At least one member of the Court has expressed interest in a ***Delgado***-type rule. ***See State v. Garteiz***, 688 P.2d 487, 488-89 (Utah 1984) (Durham, J. specially concurring). However, traditional totality of the circumstances analysis has been effective. ***See, e.g., Moosman***, 794 P.2d at 477-79 (upholding jury waiver); ***State v. Cook***, 714 P.2d 296, 297-98 (Utah 1986) (reversing jury waiver). Moreover, if a supervisory rule were imposed, its non-mandatory non-constitutional nature should be made clear. ***See Williams***, 715 F.2d at 1178-86 (extensively distinguishing the ***Delgado*** rule from Sixth Amendment requirements and refusing to "constitutionalize" the rule).

The rest—Ron Yengich, Edward Montgomery, Mary Corporon, and Richard Mauro—eventually withdrew because, in essence, defendant refused to cooperate with them. ***See Id.*** Defendant refused the services of Manny Garcia. ***See Id.*** At one point, defendant expressed a desire to privately retain a Muslim out-of-state attorney, but later represented that even though the Pakistan government offered to provide him one, he preferred to "fight this thing [the motion for new trial] by myself" because "I'm capable of doing it myself" (R453: 9).

Defendant was clear why he wanted to represent himself in the hearing on the motion for new trial. Beginning pretrial and continuing throughout the proceedings, defendant consistently rejected those who disagreed with him. ***See*** *Statement of the Case, supra.* He complained when his attorneys did not follow his directions, failed to consult with him before filing motions, or criticized his actions. ***See Id.*** He believed that his attorneys wanted to "silence" him and were mutually involved in a "cover up" and/or conspiracy against him (id.). He did not trust the American justice system and called his trial counsel (Montgomery), the prosecutor, the victims, and the investigating detective "liars" (R1407: 310, 435-56, R449: 5-7). He accused Mr. Yengich of hating him because he was a Muslim (R1407: 346-56; R449: 8). He viewed the trial judge as fair and non-racist, but turned on her when she sentenced him to prison (R1407: 119, 311).[19]

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[19] After trial, defendant wrote Judge Stirba to express his appreciation for her fairness and admitted that if the victims were believed, the evidence supported the verdicts (R1407: 119). Later, after he was sentenced to prison, he claimed her death was retribution: "I previously assumed that Judge Stirba would grant me justice but instead she sold my soul to devils and bought plenty of hell fire for her" (R1407: 345). Such

Defendant also wanted to represent himself because he wanted the freedom to express his views, including his political concerns (R204: 9-10; R499: 3-5; R453: 7-8; R455: 14). When he was represented by counsel, he knew that he could not directly communicate with the judge (R1407: 71). If he represented himself, he believed no such stricture applied (R1407: 304-05). He did not feel that his attorneys believed in his case (R1407: 304-05; R499: 9-10; R455: 12-13). If he proceeded *pro se*, he would have "a chance to make it [the lies] public" and "say what I am going to say" (R499: 5-6, 9-11).

Defendant expressed his desire to represent himself to Judge Lubeck, who, after Judge Stirba died, handled an early post-trial hearing, and Judge Burton, who heard and denied the motion for new trial (R1407: 296, 304-05, 370-72, 399, 409-10; R204: 9-10; R449: 5-6, 11, 16-21; R452: 12-13; R453: 3-8; R455: 2-15; R457: 6-9). Both judges were familiar with defendant's writings and Judge Burton interacted with defendant on several occasions (id. & R449: 17; R455:15). Judge Lubeck conducted the initial waiver colloquy, and Judge Burton conducted a second inquiry a year later (R449: 3-21; R453: 10-17; R455: 2-28). ***See*** *Addendum D (Counsel Waiver Colloquies).* Both judges concluded that defendant voluntarily and knowingly waived his right to counsel (R449: 20; R453: 11, 15).

Now, for the first time on appeal, defendant claims that the court plainly erred in accepting the waiver (*Br.Aplt. at 1-2 & Point II*). Defendant asserts that he did not

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exchanges were typical of defendant when he disagreed with a person (R1407: 41, 47-53, 56A, 361-63, 370-72, 374-75, 379-81; R449: 3-6).

voluntarily waive counsel, but was forced to proceed *pro se* because his attorneys were "disinterested" in the case (*Br.Aplt. at 26-39*). He claims that his choice to proceed *pro se* was not knowing because the colloquies did not fully conform to those recommended in ***State v. Frampton***, 737 P.2d 183, 187-88 (Utah 1987) (*Br.Aplt. at 42-46*). ***See*** *infra, n.23.* Finally, defendant argues that the court's acceptance of the waiver necessarily prejudiced him because if he had counsel during the hearing on the motion for new trial, he would have established that his trial counsel's failure to call an expert locksmith adversely impacted the outcome of the trial (*Br.Aplt. at 48-49*). Defendant's claims have no merit.

(A) Defendant Rejected the Offer of Competent and Conflict-Free Counsel.

Because defendant expressly declined the offer of counsel, "he has the burden of showing by a preponderance of the evidence that he did not so waive his right to counsel." ***State v. Arguelles,*** 2003 UT 1, ¶ 74, 63 P.3d 731. ***Accord State v. Bakalov***, 1999 UT 45, ¶ 22, 979 P.2d 799. This requires that defendant establish that (1) he did not voluntarily decline an offer of competent, conflict-free counsel, and that (2) he did not knowingly elect self-representation. ***See Id.*** Further, because defendant did not object below, he must now establish plain error in the court's acceptance of his waiver.[20]. ***See State v. Casey***, 2003 UT 33, ¶ 41, 488 Utah Adv. Rep. 14.

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[20] Defendant acknowledges that even if successful, he is only entitled to a new evidentiary hearing with the assistance of counsel, not a new trial (*Br.Aplt. at 27*).

Defendant attempts to meet his burden by arguing that his rejection of counsel was "not entirely voluntary" because he was "required to chose between counsel disinterested in the case, and proceeding pro se" (*Br.Aplt. at 39 & 27-41*). The claim has no record support.

Below, defendant never claimed that his attorneys were "disinterested." He complained that they did not share his view of his motion for new trial, or claimed that they were "unduly influenced" by his "enemy," Mr. Yengich. ***See*** *Statement of the Case, supra.* ***See also State v. Wulfenstein***, 733 P.2d 120, 121 (Utah) (reaffirming that a defendant has no right to "pick and choose and discharge his court-appointed counsel at will with a demand or expectation that the court will appoint a new one"), *cert. denied*, 484 U.S. 803 (1987).

Ms. Corporon drafted and filed the motion for new trial (R1407: 202-16). Defendant complained that she did not consult with him in its drafting and did not incorporate all of his arguments; however, he was allowed to present arguments beyond those in the written motion (R453: 7-8). When Ms. Corporon withdrew, defendant disclaimed knowing why she wanted to withdraw, but later accused her of improperly trying to curtail his anti-Mormon, anti-American outbursts. ***See*** *Statement of Case, supra.*. Ms. Corporon explained that she withdrew for ethical reasons and because defendant refused to cooperate with her.[21] ***See*** *Id.*

Defendant postulates that Mr. McCaughey was unprepared and disinterested (*Br.Aplt. at 28 & n.6*). When Mr. McCaughey withdrew, he briefly explained what lead to defendant's

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[21] Defendant implies that Ms. Corporon withdrew over money (*Br.Aplt. at 27-28 n.5*). This is misleading. When she moved to withdraw, Ms. Corporon simply explained that defendant was indigent and entitled to appointed counsel (R448: 10).

rejection of him. Mr. McCaughey reviewed the pleadings, the findings and conclusions in support of the verdicts, and the motion for new trial and memoranda, and then told defendant that he did not believe the motion for new trial would succeed. ***See*** *Statement of the Case, supra.* Defendant immediately asked him to withdraw. ***See*** *Id.* Mr. McCaughey did not represent that he had completed his preparation for the hearing and did not suggest that the trial transcripts were not necessary. To the contrary, he told the court that defendant was entitled to the transcripts and then arranged for their preparation and delivery to defendant at the prison before he withdrew (R1407: 298, 340, 343; R449: 3-4). In sum, the record does not support defendant's assertion that Mr. McCaughey was derelict.

Similarly, defendant suggests that the prosecutor improperly tried to remove standby-counsel (Mr. Mauro) and that Mr. Mauro did not meet with defendant (*Br.Aplt. at 33*). The record does not support the suggestion. Once, shortly after he was appointed, Mr. Mauro did not appear (R1407: 353; R453: 3). The prosecutor asked defendant to clarify if he was willing to proceed without counsel for purposes of that hearing (R453: 3). In the same hearing, defendant said Mr. Mauro had not met with him (id.). Six months later, when Mr. Mauro withdrew, the attorney verified that he had met with defendant, discussed the motion for new trial, hired an investigator, and was in the process of preparing for hearing when defendant filed his bar complaint. ***See*** *Statement of the Case, supra.* Again, the record does not support that Mr. Mauro was "disinterested."

Three days after Mr. Mauro's withdrawal, the court offered to appoint Manny Garcia, but defendant refused his assistance (R1407: 405, 409-10; R435: 2-10). The refusal had nothing to do with Mr. Garcia's interest in the case; the problem was that because he had just been appointed, he needed time to review it. ***See*** *Statement of the Case, supra.* Defendant objected: he was ready to proceed and saw no reason for more delays.[22] ***See*** *Id.*

Defendant's suggestion that the court forced defendant into proceeding without counsel is equally without support. ***See*** *Br.Aplt. at 35 n.9.* The court offered to continue the motion hearing if defendant accepted Mr. Garcia's assistance, but if as defendant suggested, "today was the day," Mr. Garcia was not ready through no fault of his own (R455: 2-10). Subsequently, during the same hearing, the court realized that defendant's witnesses were not subpoenaed and continued the evidentiary hearing after agreeing to assist defendant in subpoenaing them (R455: 25-27, 39-45). The court did not pressure defendant; it accommodated him.

In sum, defendant was offered multiple competent and conflict-free attorneys, but expressly rejected their assistance. Consequently, defendant waived his right to counsel

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[22] Defendant argues that he did not voluntarily waive counsel because he asked for substitute counsel, i.e., a Muslim attorney (*Br.Aplt. at 31*). This distorts the record. Defendant knew he was not entitled to the appointment of a Muslim out-of-state attorney, but hoped that his family might privately arrange for one (R449: 16-19). He was provided time to arrange it (id.). Subsequently, defendant told the court that the Pakistan government offered to provide him with Muslim representation, but he wanted to proceed *pro se* (R453: 9).

unless he now establishes that the trial court plainly erred in concluding that the waiver was voluntary and knowing.

(B) The Court Did Not Plainly Err in Allowing Defendant to Proceed Pro Se.

Defendant claims that even if he expressly rejected counsel, the colloquies failed to fully comply with ***Frampton*** and, therefore, the court plainly erred in concluding that defendant's waiver of counsel was voluntary and knowing (*Br.Aplt. at 42-47*). The argument is without merit.

The Sixth Amendment grants a criminal defendant the right of self-representation as well as the right to counsel. ***See Bakalov***, 1999 UT 45, ¶ 15. When a defendant expresses a desire to proceed *pro se*, the trial court must question him to ensure that he is knowingly and voluntarily relinquishing his right to counsel. ***See Id.*** at ¶¶ 15-23. This Court recommends a 16–point colloquy.[23] ***See Arguelles***, 2003 UT 1, ¶ 70. But compliance with the recommended colloquy is not dispositive; instead, the test is whether, under the totality of the circumstances, the waiver is knowing and "expressly made with 'eyes open.'" ***Id.*** at ¶ 15 (quoting ***Faretta v. California***, 422 U.S. 806, 835 (1975)) . In other words, the record

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[23] In ***Frampton,*** 737 P.2d at 188-89, the Court recommended sixteen questions concerning a defendant's understanding of the rules of evidence and procedure, and their application to the hearing in question; his past experience, if any, in self-representation and his understanding that the court cannot advise or assist him; his knowledge of the crimes and penalties; his understanding that his testimony must proceed by question and answer; and the voluntariness of his choice. It also directs trial courts to warn against self-representation and to consider the appointment of standby counsel if the defendant is allowed to proceed *pro se*.

must establish that the defendant was provided with sufficient information to make a choice, even if that choice is not an intelligent or wise one. ***See State v. VanCleave***, 2001 UT App 228, ¶ 17 n.6, 29 P.3d 680, *cert. denied*, 40 P.3d 1135.

Defendant analyzes isolated questions in the colloquies to support his claim of error (*Br.Aplt. at 42-46*). Such an approach does not fairly consider the totality of the circumstances surrounding the waiver as required by controlling case law. ***See Arguelles***, 2003 UT 1, ¶ 70; ***Bakalov***, 1999 UT 45, ¶ 17-25. When placed in context, the court properly concluded that defendant voluntarily and knowingly waived counsel.[24]

Judges Lubeck and Burton were aware that defendant was a Pakistani national who had resided in the United States for 10 years (R1407: 56, 308, 315). Defendant obtained one college degree in Pakistan and a second degree in Idaho, though he worked as a taxicab driver in Utah (R1407: 315; R449: 16). He was fluent in both written and spoken English and did not require a translator. He was married to an American and had sufficient family support that he was able to twice pay "thousands of dollars" and hire private counsel (R1407:

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[24] Consideration of the totality of the surrounding circumstances is particularly appropriate in this case, where a year elapsed between the first and second colloquies, during which time defendant continued to seek self-representation. ***See*** *discussion, supra.* Additionally, in the same hearing, immediately following the second colloquy, defendant "outlined" his rule 24, Utah Rules of Criminal Procedure, argument and laid "foundation" for his exhibits (R455: 17-71). ***See*** *Add. A.* A month after this, defendant represented himself in the evidentiary hearing (R1407: 415). Consequently, the court had much more than the bare colloquies from which to judge the voluntary and knowing nature of defendant's waiver of counsel. ***See Bakalov***, 1999 UT 45, ¶¶ 15-26 (analyzing waiver of counsel in context of entire case history).

345-56; R449: 5-7). He was also appointed multiple attorneys at state expense and was provided transcripts at state expense. ***See*** *Statement of the Case, supra.* Through his wife, he had assembled a "report" entitled "Travesty of Justice," which protested his innocence, summarized the case, and criticized the justice system (R1407: 306-35; R449: 45; Exhibit 7). The report had been freely distributed to the judges assigned to defendant's case, the media, the governor of Utah, and the Pakistani Consulate General in Los Angeles, California (id.). Defendant filed documents with Judges Lubeck and Burton and appeared before Judge Burton on other occasions. ***See*** *Statement of the Case, supra.* Both judges expressly considered defendant's past conduct, knowledge, and intelligence in judging the validity of his waiver (R449: 17, 20; R455: 15). At the same time, both judges warned defendant that he would be at a disadvantage in representing himself (R449: 17-28; R455: 12-13).

Defendant was not law-trained and had not previously represented himself, but he spoke extensively to Mary Corporon about rule 24 and the limitations it placed on a motion for new trial (R449: 16-18; R453: 10; R455: 12-13, 20-23, 27, 64). He could quote the rule verbatim and understood its requirement of substantial prejudicial error; he also recognized that a discretionary standard applied to a motion for new trial (id. & R453: 7-14). He recognized that until the new trial motion was resolved, deportation was unlikely and an appeal precluded (R448: 15; R449: 7; R455: 12). He discussed the merits of the motion with Ms. Corporon, Mr. McCaughey, and Mr. Mauro (R204: 4; R453: 10, R449: 3).

Defendant planned on using Mary Corporon's new trial motion as a "guideline," but would present additional arguments within the context of rule 24 (R449: 16; R453: 7-14). Defendant recognized his need for trial transcripts and also wanted transcripts of the hearings leading up to the evidentiary new trial hearing (R449: 4; R452: 7-8, 28, 31; R453: 21; R455: 18). He properly requested subpoenas for his witnesses and recognized his right to call adverse witnesses, including the prosecutor and the investigating detective (R457: 6-8; R455: 3-5). He had read the prosecutor's response to the motion for new trial and believed he could refute it with logic and a showing of ineffective counsel (R453: 7-8, 11-14).

Defendant claims, for the first time on appeal, that the court plainly erred in accepting his waiver because the court did not anticipate an evidentiary hearing and did not question defendant accordingly (*Br.Aplt. at 44*). Defendant is incorrect. While Judge Lubeck early on assumed the motion would be resolved with legal argument, Judge Burton, a year later, knew an evidentiary hearing was required and discussed this with defendant, including what witnesses he wanted subpoenaed and the general parameters of his argument (R449: 20; R453: 5-7, 17; R457: 2-9; R455: 39-45, 65-71). Defendant exhibited a clear understanding of evidentiary hearings based on his own trial experience—indeed, at one point, defendant expressed surprise that the investigating detective was not present in the courtroom since he was exempted from the exclusionary rule (R453: 5-6).

Nevertheless, defendant now claims that he did not understand that he could testify during the motion for new trial (*Br.Aplt. at 44*). The claim is disingenuous: defendant

testified in his own trial and compelled his opposing counsel (the trial prosecutor) to testify at the evidentiary hearing (R450: 13-186; R454: 65-70, 83-101). Moreover, in light of defendant's arguments (ineffective counsel and newly discovered evidence), there appears little reason for defendant to have testified at the evidentiary hearing. In any case, defendant fully expressed facts and personal views throughout the new trial proceeding—for as defendant acknowledged below, acting *pro se* provided him with *more* freedom to express his views (R1407: 304-05). Indeed, when he had been represented by counsel, defendant felt he had a "rope tied" around his neck, which the lawyers continually tightened (R449: 4-5).

In sum, the waiver of counsel colloquies fairly conformed with ***Frampton***'s recommendations. The voluntary and knowing nature of defendant's waiver was further supported by defendant's extensive and skilled interactions with the court. Consequently, defendant has failed to establish any obvious error in the court permitting defendant to do what he wanted—to stop dealing with attorneys and to proceed *pro se*.

(C) Defendant Has Not Established that He Was Prejudiced.

As defendant acknowledges, even if he, arguendo, established obvious error, he must still establish that the error was prejudicial (*Br.Aplt. at 47-50*). ***See Casey***, 2003 UT 33, ¶ 41. Here, defendant's claim of prejudice may be summarily rejected.

Defendant argues that his trial attorney (Montgomery) was deficient in deciding not to call a locksmith to discredit the Millers' account of the damage to their door (*Br.Aplt. at 47-50*). He also claims that if he had realized no expert would testify, he would not have

waived a jury (*Br.Aplt. at 49-50*). Defendant asserts that but for the waiver of counsel at the evidentiary hearing, he would have established that the failure to call a locksmith adversely impacted the outcome of his trial (*Br.Aplt. at 50*).

Essentially the same arguments were presented and rejected during the hearing on defendant's motion for new trial. Defendant claimed that his trial counsel was ineffective for failing to call a locksmith as an expert witness. ***See*** *Statement of the Case, supra.* Mr. Montgomery explained he had investigated this possibility, but the locksmith he contacted supported the State's case. He decided that even if he found an expert favorable to the defense, an inconclusive battle of the experts might ensue (R454: 41-43, 48, 114, 118-19). He opted instead to attack the Millers' testimony by pointing out its inconsistencies (id.). The court found and concluded that trial counsel's decision was legitimate and did not constitute ineffective counsel (R1407: 421-22, 424; R5044: 196-97, 199). ***See*** *Add. E.* Defendant does not challenge this ruling on appeal—he impermissibly ignores it.

Defendant's claim, that he would not have waived the jury if he had known no expert witness would testify, is equally unsupported by the record. During the hearing on the motion for new trial, defendant explained that he considered his defense as a whole in waiving the jury, but did not claim that his decision would have been different if he had known that no expert would be called (R454: 29, 144). Instead, as found by the motion court, defendant and his trial counsel decided that based on defendant's apprehension of a Utah jury and Judge Stirba's reputation for fairness, a bench trial might be more beneficial

to defendant (R1407: 311, 420-21; R5044: 195-96; R454: 29, 50, 57, 144). ***See*** *Add. E.* Again, defendant simply ignores this finding.

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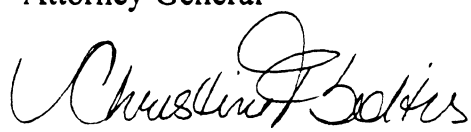
In sum, defendant has not established by a preponderance of the evidence that he did not waive counsel or that the court plainly erred in concluding that the waiver was voluntary and knowing. ***See Arguelles***, 2003 UT 1, ¶ 74.

CONCLUSION

This Court should affirm defendant's multiple convictions for aggravated burglary and assault.

RESPECTFULLY SUBMITTED this 13th day of January, 2004.

MARK L. SHURTLEFF
Attorney General



CHRISTINE F. SOLTIS
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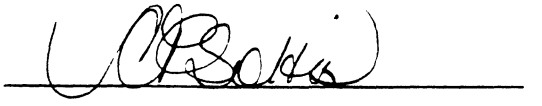
CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Plaintiff/Appellee were mailed to LINDA M. JONES, SALT LAKE LEGAL DEFENDER ASSOCIATION, attorneys for Defendant/Appellant, 424 East 500 South, Suite 300, Salt Lake City, UT 84111, this 13 day of January, 2004.



ADDENDA

Addendum A

Statutes, Rules, Constitutional Provisions

U.S. Const. Amend. VI

Utah R. Crim. P. 17 (2003)
Utah R. Crim. P. 24 (2003)

Utah Code Ann. § 76-5-102 (1999)
Utah Code Ann. § 76-6-203 (1999)

UNITED STATES CONSTITUTION

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence

Rule 17. The trial.

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel The defendant shall be personally present at the trial with the following exceptions

(a)(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence,

(a)(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present, and

(a)(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial

(b) Cases shall be set on the trial calendar to be tried in the following order

(b)(1) misdemeanor cases when defendant is in custody

(b)(2) felony cases when defendant is in custody,

(b)(3) felony cases when defendant is on bail or recognizance, and

(b)(4) misdemeanor cases when defendant is on bail or recognizance

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise No jury shall be allowed in the trial of an infraction

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U C A 1953

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required

(g) After the jury has been impaneled and sworn, the trial shall proceed in the following order

(g)(1) The charge shall be read and the plea of the defendant stated,

(g)(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested,

(g)(3) The prosecution shall offer evidence in support of the charge,

(g)(4) When the prosecution has rested, the defense may present its case,

(g)(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits,

(g)(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury, and

(g)(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining Otherwise, the jury shall be discharged and a new trial ordered

(i) *Questions by jurors* A judge may invite jurors to submit written questions to a witness as provided in this section

(i)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body The judge may disallow any question from a juror and may discontinue questions from jurors at any time

(i)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the

(i)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question The judge may disallow a question even though no objection is made The judge shall preserve the written question in the court file If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it The question may be rephrased into proper form The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question

(j) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose The officer shall be sworn that while the jury are thus conducted he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time

(k) At each recess of the court whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them

(l) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury such as exhibits of unusual size, weapons or contraband The court shall permit the jury to view exhibits upon request Jurors are entitled to take notes during the trial and to have those notes with them during deliberations As necessary the court shall provide jurors with writing materials and instruct the jury on taking and using notes

(m) When the case is finally submitted to the jury they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged unless otherwise ordered by the court Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them or make any himself, except to ask them if they have agreed upon their verdict and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon

(n) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause they shall inform the officer in charge of them, who shall communicate such request to the court The court may then direct that the jury be brought before the court where in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given Such response shall be recorded The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record

(o) If the verdict rendered by a jury is incorrect on its face it may be corrected by the jury under the advice of the court, or the jury may be sent out again

(p) At the conclusion of the evidence by the prosecution or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense

Rule 24. Motion for new trial.

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

(b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.

(c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period.

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument.

76-5-102. Assault.

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

(a) the person causes substantial bodily injury to another; or

(b) the victim is pregnant and the person has knowledge of the pregnancy.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another. 2003

76-6-203. Aggravated burglary.

(1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime:

(a) causes bodily injury to any person who is not a participant in the crime;

(b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or

(c) possesses or attempts to use any explosive or dangerous weapon.

(2) Aggravated burglary is a first degree felony.

(3) As used in this section, "dangerous weapon" has the same definition as under Section 76-1-601. 1989

Addendum B

Jury Waiver Colloquy
(R456:5-8)

sever at that time.

MR. MONTGOMERY: That does not work for me, Your Honor.

THE COURT: It does not? Okay.

Marci, do you have another time.

THE CLERK: Friday the 28th at 8:30.

THE COURT: All right. And do I have the Jury Instructions, voir dire and --

MR. MONTGOMERY: We can provide them further. My client is willing to waive a jury trial, and the State is in concurrence with that.

THE COURT: I see. All right.

Mr. Hassan, if you would -- I'd like to have you sworn in. Would you please raise your right hand?

(Defendant sworn.)

All right. Mr. Hassan, do you understand that as a criminal defendant in both of these trials you have the right to have a jury of eight people to decide the outcome of the case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And that if this were to be tried to the jury -- and that that is a constitutional right that you have. All right. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: That if this were to proceed to a trial

by jury, a verdict of guilty would require an unanimous verdict of all eight jurors; do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And I understand that you wish to waive your right to a jury trial?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that means that you'd be giving up your right to a jury trial?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And is that what you want to do, give up your right to a jury trial?

THE DEFENDANT: Yes, Your Honor, I do. I have some reasoning for that --

THE COURT: Pardon me?

THE DEFENDANT: I have some reasoning for making that decision. I have written something down. It's difficult to me, but these things I have --

THE COURT: Well, let me ask you this: I want to make sure that you understand what you are doing and that you are giving up your right to a jury trial knowingly and voluntarily and with full understanding of what you are giving up. I am not trying to talk you out of it or into it. I'm just trying to make sure you understand what you are doing.

THE DEFENDANT: Yes, Your Honor.

THE COURT: You talked about this decision to give up

your right to jury trial with counsel?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is anyone pressuring you to give up your right?

THE DEFENDANT: No, Your Honor.

THE COURT: Are you doing it of your own free will?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions about -- do you understand that a jury doesn't hear the evidence in this case, that it is tried to me as a judge.

THE DEFENDANT: Yes, Your Honor.

THE COURT: And that I will be the only person making the decision on the guilt or innocence; do you understand?

THE DEFENDANT: Absolutely.

THE COURT: And is that what you want to have happen?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Any questions about it?

THE DEFENDANT: Not any questions about this thing.

THE COURT: All right. I'm focusing on the jury trial issue right now. Okay, I'm just focusing on that.

You might have questions about other aspects of the trial, but if you have any questions about giving up the right to a jury trial, now is the time to ask me.

THE DEFENDANT: No, Your Honor, I don't.

THE COURT: All right. Based on your testimony, I

find that you have knowingly, voluntarily and with full understanding of your rights given up your Constitutional rights to a jury trial, and the case will proceed to the Court beginning on May 1st, and I'll schedule three days for that.

In lieu of that, then jury instructions are not needed. We will begin the trial at 9:30 in the morning.

Are there any motions in limine?

MR. MONTGOMERY: No, Your Honor.

THE COURT: All right.

And Mr. Parker for the State, the State is also giving up its right to a trial by jury?

MR. PARKER: We are, Your Honor.

THE COURT: Okay.

MR. MONTGOMERY: I think we can -- if it helps the Court at all, I don't think it is going to take three days. I think we can do it in two or perhaps less than that.

THE COURT: All right.

Well, I do want to talk about whether Mr. Hassan would feel comfortable with an interpreter. I know that he communicates very well in English, but given the pace of the trial does your client require an interpreter present?

MR. MONTGOMERY: I don't think so. We've discussed it, and I don't think so.

THE COURT: All right.

Is there any other matter that we need to attend to

Addendum C

Findings & Conclusions - Verdicts
(R1407:182-87; R5044:127-32)

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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- REHAN HASSAN, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF CONVICTION Case No. 991911407FS and 991915044FS Hon. Anne M. Stirba

On May 15, 2000, this matter came before this Court for trial. The State was represented by Paul B. Parker, Deputy Salt Lake District Attorney. Defendant was present and represented by Edward R. Montgomery. The State called as witnesses Carol Miller, J.D. Miller, Kathy Harris, Officer Bruce Evans and Detective Brad Burmingham. The Defendant testified and also called as a witness Abdou Bah. Photographs of the door of the Miller's apartment were admitted into evidence. Following the evidence both sides presented closing arguments.

Having listened to the witnesses and having admitted the evidence and after having considered the arguments, this court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On May 29, 1999, J.D. and Carol Miller lived in an apartment located at 550 East 300 South #1, Salt Lake City, Utah.
2. Defendant lived in the same apartment building directly across the hall from the Millers in apartment #2.

3. The Millers were hired to assist in taking care of the apartment building. They received a reduction in the amount of their rent for their services.
4. Sometime prior to the 29th, the electrical power to defendant's apartment was shut off by the power company.
5. To get power inside his apartment, defendant ran an electrical cord from his apartment out into the common areas of the building and plugged the cord into a electrical outlet.
6. The power for the outlets in the common area of the apartment building was paid for by the building owners and defendant did not have permisson to use the power for his own apartment.
7. On the 29th of May, the Millers found the electrical cord from defendant's apartment and J.D. unplugged it.
8. Defendant became upset when he found the cord unplugged.
9. Around 8:30 p.m., defendant went to the Millers' apartment door and confronted Carol about the cord.
10. Carol did not let defendant inside but rather left him standing in the hall outside the door.
11. A verbal argument followed and eventually Carol shut the door.
12. Defendant became upset and kicked at the outside of the door several times until the door flew open.
13. Defendant entered the apartment with the intent to assault Carol and/or J.D.
14. Defendant told Carol that he was going to kill her and J.D. and then he grabbed Carol by the arm and threw her to the floor.

15. Defendant's actions in grabbing Carol and throwing her to the floor caused Carol pain and caused a small bruise on her arm.
16. Defendant left the apartment.
17. The Miller's closed the door and tried to secure it.
18. About ten minutes later, Defendant again broke through the Miller's apartment door.
19. Defendant entered with the intent to assault Carol and/or J.D.
20. Defendant went to one of the bedrooms where Carol Miller was dressing.
21. Defendant again threatened to kill Carol. Defendant also grabbed Carol and pushed her to the floor.
22. Defendant then went to J.D. and hit him in the face and grabbed his hair.
23. One of J.D.'s teeth was broken by the blow.
24. Defendant then left.
25. Defendant returned a third time.
26. This Court cannot say beyond a reasonable doubt that he had a gun as he entered the apartment that third time.
27. On June 3, 1999, Kathy Harris was working with her son outside the apartment building at 550 East 300 South.
28. Kathy is the wife of Ed Harris. Ed is the manager of the apartment building.
29. Kathy assists her husband in managing the building.
30. Carol approached Kathy and told her that defendant had plugged another power cord into the common area outlets.

31. Kathy approached defendant's front door and saw an extension cord running across the hall connecting defendant's apartment with a common outlet in the hallway.

32. Kathy knocked on defendant's door.

33. Defendant answered the door. Kathy explained that she was Ed Harris' wife and that defendant could not use the apartment building's power in his own apartment.

34. Defendant knew that Ed Harris was the apartment manager.

35. Kathy did not enter or attempt to enter defendant's apartment.

36. Kathy did reach down to unplug the power cord from the hallway outlet.

37. Defendant immediately hit Kathy in the mouth, shoved her against the wall across the hall and began to kick her repeatedly.

38. Defendant's blows caused Kathy pain and soreness.

CONCLUSIONS OF LAW

1. The elements of the crime of Burglary are: entering or remaining unlawfully in a building with the intent to commit an assault.

2. The elements of the crime of Assault are: an act committed with unlawful force or violence that causes or creates a substantial risk of bodily injury to another.

3. The elements of the crime of Aggravated Burglary are: in attempting, committing, or fleeing from a burglary the actor causes bodily injury to any person not a participant in the crime or uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime or possesses or attempts to use a dangerous weapon.

4. A dangerous weapon is defined as any item capable of causing death or serious bodily injury; or a facsimile or representation of the item; and the actor's use or apparent intended use of the items leads the victim to reasonably believe the items is likely to cause death or serious bodily injury or the actor represents to the victim verbally or in any other manner that he is in control of such an item.

5. Bodily injury means physical pain, illness, or any impairment of physical condition.

6. Serious bodily injury means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

7. Defendant's first entry into the Miller's apartment with the intent to commit an assault on the Millers meets the elements of Burglary.

8. Defendant's acts of grabbing Carol Miller and throwing her to the floor caused bodiliy injury to Carol Miller and meets the elements for Assault as charged in count IV of case 991911407.

9. Defendant's acts that caused bodily injury to Carol Miller occurred while defendant was in the commission of burglary of the Millers' apartment , therefore the elements have been met of Aggravated Burglary as charged in count number II of case 991911407.

10. Defendant's second entry into the Miller's apartment with the intent to commit an assault on the Millers also meets the elements of Burglary.

11. Defendant's acts during the second entry of hitting J.D. Miller in the face and pulling his hair caused bodily injury to J.D. Miller and meets the elements for Assault as charged in count V of case 991911407.

12. Defendant's acts causing bodily injury to J.D. Miller occurred during defendant's commission of burglary of the Millers' apartment and therefore meets the elements of Aggravated Burglary as charged in count number I of case number 991915044.

13. Defendant's acts hitting Kathy Harris in the mouth and kicking her caused bodily injury to her and therefore meets the elements of Assault as charged in count III of case 991911407.

14. Defendant's entering the third and final time does not meet the element of Aggravated Burglary as charged in count I of case 991911407.

ORDER

Having made the above findings of fact and conclusion of law, IT IS THEREFORE ADJUDGED AND ORDERED that defendant is guilty of counts II, III, IV, V of case 991911407 and of count I of 991915044. IT IS ALSO ADJUDGED AND ORDERED that defendant is not guilty of count I of 991911407.

DATED this ~~26th~~ 27th day of ~~May~~ June, 2000.

BY THE COURT:

ANNE M. STIRBA, District Judge

Approved as to form:

Edward R. Montgomery

Addendum D

Waiver of Counsel Colloquies
(R449:3-21; R453:10-17; R455:2-28)

P R O C E E D I N G S

THE COURT: Good morning. Welcome. This is State of Utah vs. Rehan Hassan, case No. 991911407. Are you Mr. Hassan?

THE DEFENDANT: Yes.

THE COURT: Mr. Hassan is present with his attorney Steve McCaughey. The State is here with Mr. Parker. This is the time calendared for oral argument on a motion for a new trial, which was filed by Ms. Corporon, on Mr. Hassan's behalf, back in August of last year. Mr. McCaughey?

MR. McCAUGHEY: Your Honor, initially we have a couple of problems here. One, I have spoken with Mr. Hassan, and he indicates that he would like to have -- a couple things he wants to have. He wants to have the transcript of the trial before this argument proceeds.

I have talked to him a little bit about the issues in the argument, and told him, while we can argue these issues, I don't believe they are particularly meritorious issues. His concern seems to be more with the political nature of this case, as opposed to the factual nature. And so his desire, his expression to me was that if I didn't agree with his take on the case, then he probably should represent himself. I told him that I am not a politician, I am a criminal lawyer, and my evaluation, without having seen the trial transcripts, but with having seen the findings of fact prepared by Judge Stirba, and

reviewing the documents filed by the numerous attorneys in this case, that he and I probably didn't agree on the best way to approach this case. And so he would like to have the transcripts ordered. I think he is entitled to that prior to the argument for the new trial. But I think he wants to represent himself, and I would ask permission to withdraw.

THE COURT: Mr. Parker, what is your position?

MR. PARKER: Well, I suppose my only difficulty on this is this is not the first time the defendant has had difficulty with his attorney. We have just --

THE COURT: Mr. McCaughey is No. 6.

MR. PARKER: Yes. And we just went again and again. There has been continuance after continuance of various motions. None of this is Mr. McCaughey's fault. He is, like I say, No. 6 on this series of attorneys. Somewhere down there the defendant is going to have to take responsibility for his actions, and work with the appointed attorneys that he has. We are prepared. This motion has been filed almost a year ago. The issues are fairly clear. We both filed responsive motions on it. I think we need to proceed as soon as we can.

THE COURT: Mr. Hassan, let me address you directly, then. You heard Mr. McCaughey, what his request was on your behalf. That's what you want to do, you want to put this off, obtain the transcript, and argue it, yourself?

THE DEFENDANT: Yes, your Honor. If I could explain

a few more things, be on the record right now. The trial transcripts are the key for my case. I have been asking for them. Now, if you said I had problems with my attorneys, the problem was there, apparently, Mary Corporon ended up filing a memorandum without my consent, without my consultation, without my approval, and she did whatever she wanted to do. She took whatever money she wanted to when she dropped the case, whenever she felt it right. How could somebody present me without going through my case? That is as clear as daylight. No attorney can really, like Mr. McCaughey, cannot know about my case until they know that the key to success to my case is my trial transcripts.

As far as the religious or political issues concerned, yeah, I am waiting, I consider my case to be on the same grounds as Laurie Berensen, and I am a victim, not a criminal. My wife has been suppressed. I have not been given an opportunity at all by Judge Stirba to express myself. I was all the time under pressure, if I speak, the attorneys kept telling me not to say anything, not to say anything, if I speak, it is like a rope tied on my neck, and it will get tighter, and I will end up spending more time in prison and all those things.

My case has been and is as clear as daylight, open discrimination. There is no doubt about it. Mr. Yengich totally messed up the case. I will -- one by one, I am willing

to explain all the attorneys what they did to me. All it is, it is 100 percent cover up. I want to be given a chance to make it public. We have tried all avenues, me and my wife, worked day and night.

There are a lot of things Mr. Parker has done which are definitely very cruel of him and very evil of him. I have reason to say that this person is an enemy of Islam. This person is a racist. This person has made my life and my wife's life hell. I care less if I live or if I die, anymore. I am fighting for the sake of my religion, for the sake of my dignity, my family value. My religion has taught me a few things, to stand against injustice. And I will fight this case to the last drop of my blood. If, like the Board of Pardons has decided let me go next year, October, if this case wound up, is being proceeded more than that, sir, I don't want to get -- I don't want to spend the rest of my life in prison. I don't mind if you want to put me on death row. My arm has been broken. These people have tortured my life day and night. I don't want to get overemotional. This is a hypocrisy. This is a lie. This is an attack on my religion. That's all what it is.

The door was never broken. How in the earth I could go inside. These people keep on lying, Mr. Parker keep on lying putting those false witnesses on the stand, never gave me a chance to explain myself. Detective Burningham, 100 percent

lied. I gave him the phone number. He didn't call the witness. What is my fault in that? I have been tortured. I am on medication now. I have been going through nervous breakdowns now. I believe Mr. Parker should be put into prison. This person should be put into prison, and Detective Burningham should be put into prison. Luckily, Judge Stirba is not alive anymore, and may God do justice whatever she did to me.

I am not willing to give in at all, at any cost, no matter whatsoever. I love my wife. I want to be with her. If you force me to take deportation, that won't work. I will make it to -- if anything happens to me, I am going to tell you very clearly sir, I am not a terrorist, I am not a criminal, I am a victim here. But if you guys want to go to the point you want to torture an innocent person on the basis of his religion, the basis of his beliefs, the basis of the way he looks, or because I have married a Mormon wife, and people hate me for that, and just because she does not even know if the Mormon religion is right or wrong. I have nothing against the Mormon religion. My religion tells me to respect all the religions. I have respected all the religions. I do have my opinions on Mormon religion. I still have the right of speech. But I have not said anything bad. I have been told by Judge Stirba to stop my wife from approaching the way she is approaching. She is approaching me when I go through a nervous breakdown. She

wrote me. I have everything in documentation.

Sir, please, give me a chance to explain at least once myself. I know you don't like what I am saying. Give me a chance to explain what I am saying. This is very important for my own physical, mental health. But if anything would happen to me, then the consequences, I am not saying, you know, whatever, but then my appeal is to the Muslims. All the Muslims are here. You know the situation in any land. And all the Pakistanis over there, what are they doing? If you want something to get started in this country, feel free for that. Torture me more, put me in prison.

Sir, please don't interrupt me right now.

MR. McCAUGHEY: I didn't.

THE DEFENDANT: I thought your gestures were bad. You are a friend of Yengich. Yengich has totally betrayed me. Mr. Yengich is an evil person. He is an enemy of Islam, too. He has written me the letters, which I have everything in record. My wife has everything in record. Judge Stirba wrote me the letter, going back to the conversation, stop your wife -- sir, can I get some water, please -- stop your wife from approaching her or her husband. What do I have to do with my wife? How could I stop her? How could I stop her from doing anything which she -- I don't have -- I cannot stop her physically. I am in prison. I have no control of my wife. She is a free person. She has the right of free speech. She

felt with her heart, her heart felt good, she know what we have been through. She believes in my innocence. She can do whatever she wants to. It is not against the law to make my case public. My wife has been suppressed again and again and again. All attorneys told me not to say a single word, including Mary Corporon.

These things need to be brought out, into the light. I am saying all these things for my own government. I want all this documentation to be sent to my government in Pakistan, eventually it is going to go to some religious leaders in Pakistan and all over. I would be a martyr if something happens to me. I consider myself as a symbol of Islam who has stood for justice and right. My attorneys have tortured me so much. Mary Corporon told me not to make it a political issue, not to make it a religious issue, not to approach anybody, not to petition. Why? What is there to hide? What is there to hide? I have nothing to hide.

Mr. McCaughey is saying I don't have any chance to win my trial, or my appeal. If that's the approach, after knowing all that I have been through, then he is not a competent attorney at all. He does not know my case. He is the same as Ron Yengich. Ron Yengich did not bother to even walk next door to him, to Mr. Parker's office, in spite of my numerous, numerous appeals to him. I have letters. I wrote him so many letters, for God's sake, go and find the evidence.

Where the heck is the evidence? I need to see it. I am losing my sleep. I have not done it.

These people, I have heard stories they are cable of going back and breaking the door which is not broken. Fortunately, all the people saw it. If the door is not broken, and the witnesses say it again and again, how am I guilty? How in the earth did the judge find me guilty? Judge Stirba is an evil judge. I am going to say it. I don't mind if you torture me or whatever. You guys want to start a holy war, let's go for it.

But I am innocent. And this case will go, you know, I would not take any torture or whatever. I am willing to die on a dignified life, if my blood can bring a revolution toward an evil system in these courts and misuse and abuse of power, which I have experienced a lot in the prison system, too, they will stop me again and again from saying my prayers, they have tortured me a lot, and I have -- my arm has been broken, I became handicapped for the rest of my life just because Mr. Parker decided to put me in prison, just because he has no other way to cover his evil deeds up. And I have -- before that, it was different, the rope was tied. Now there is no rope tied. I am going to say what I am going to say. I strongly believe that nobody can help me or harm me, but God. If he does not will, you people cannot do anything to me. That is my belief. That is where I stand.

I want to represent myself. I want to take care of my kids. I want to be given an appropriate chance to prepare my case. I want my trial transcripts to be given a copy to me. And, I don't know, the other, I want my parents to get a copy in Pakistan, because they are approaching the press over there. That is a key for my innocence. And I have told my father to write a book, just like Laurie Berensen's mother has written a book. She was in NASA, and said something common between me and -- my mother and her, that she is also a physicist. And Laurie Berensen has been tortured. I have been following her case very clearly. Whatever she is saying, same as my plea.

I am standing against injustice. I have had enough. I have racism in this country. 10 years I have been here. I have seen enough. And there has to be a stop. Life is not worth living after this. Mary Corporon told me Judge Stirba only put me to prison because she is pissed, or she was -- I should say -- she was pissed because I wrote her some letters. And what wrong did I write in those letters? My letters should be sent out to public, everything I have written should become public. I have not written anything bad. I have not threatened anybody. People told me that I made threats. I made threats? This is the biggest lie of the century. I have never threatened nobody. How dumb or stupid do I look? In prison, I am going to threaten the judge or somebody? You guys don't have a clue. I am not an ignorant person. People know

me of my intelligence, of my smartness, of the way I am, my heart is. This person comes and says whatever he wants to. I have been putting with Mr. Parker for a long, long, long time. He is just trying to get reelected to become a district attorney or something. That's the reason he is doing it, to just get the fame. He is 100 percent enemy of Islam. If the justice won't be served, then my blood be on his shoulders, and on Mr. Detective Burningham's hands. I am willing to die.

That's all, your Honor.

THE COURT: Mr. Hassan, have you taken any steps to obtain this trial transcript?

THE DEFENDANT: Yes, sir. I went to my attorneys.

THE COURT: Who? Which attorney?

THE DEFENDANT: Mary Corporon. She never contacted me. They don't reply my calls. Every time I ask them something, they find an excuse to drop my case. I asked Heidi Buchi to do the same thing. I kept on begging her, I need the trial transcripts. She dropped my case, for no reason whatsoever. I believe she dropped my case because I said that Mr. Gilbert Athay, who is, apparently, on the board list something, has also betrayed me, because he was willing to take my case, but Mr. Yengich used his undue influence on him to not let him take my case. And same Mr. Yengich is doing with Mr. McCaughey. I know that. Mr. McCaughey say Yengich is a very good friend of his. Mr. Yengich has a lot of power. And I am

against the power. Mr. Yengich, to me, has not done anything good other than just betray me. And I am not afraid of Mr. Yengich. I care less.

I am sorry, I will go to the point. I understand what you ask me. I just have too much inside of me. So can I drink a little more water? I am on medication.

THE COURT: I am just trying to get at the timing of this. If you are going to get a transcript and have another argument, I am trying to find out when that can be done. You don't have a transcript now?

THE DEFENDANT: No, sir, I don't.

THE COURT: Have you made arrangements with whatever court reporter was here at the trial to get that transcript?

THE DEFENDANT: Sir, right now I am indigent, and I thought that my state-appointed attorney would take care of them, my transcripts. That's something my parents asked him when they approached him.

MR. McCAUGHEY: Your Honor, he is indigent. I have been assigned a conflict contract. I think he is entitled to those transcripts.

THE COURT: I understand that. I was just wondering where we were in terms of --

MR. McCAUGHEY: I don't think anything has been ordered.

MR. PARKER: I have not seen a motion at all for

them, your Honor. It looks like the reporter was Gayle Campbell.

THE CLERK: She is retired, but I am sure they have access to the transcript.

THE COURT: It does seem to me that there is certainly no harm in getting a trial transcript on a request for a new trial. Mr. McCaughey, what's your suggestion? Can you help us do that? Even though Mr. Hassan doesn't want you to argue his case, do you think you can file the appropriate motion to obtain a trial transcript?

MR. McCAUGHEY: I can do that.

MR. PARKER: May I suggest, your Honor, that although there won't be a trial, we are just talking about a motion for a new trial, I think it behooves us, still, to make sure that there is a knowing and voluntary waiver of his right to counsel. He has had several. I would ask the Court to advise him that he will have difficulty representing himself in this affair. Perhaps if the Court can obtain any experience that he thinks he has or reason to believe he can do it on his own, and something to indicate the nature of the proceeding and what he is up against.

THE COURT: Well, thank you, Mr. Parker. I had in mind doing that. I wasn't sure if I was going to do it today or at the hearing. But I suspect it is a good suggestion to do that now.

Mr. Hassan, what I am going to do, at your request, is not hold this argument today. We will get the transcript, and I will review it. You will have a copy. You will get a copy of it, as well, of course. And we will set a time to come back and allow you to argue this motion. I am not going to appoint another attorney. I am not certain of who has been hired and who has been appointed. But you have had Mr. Grindstaff, and Mr. Montgomery, Ms. Corporon, Mr. Yengich, Ms. Buchi from LDA, and Mr. McCaughey. So I am not going to appoint another attorney.

You indicate you want to argue it yourself. I want to talk to you about that a little bit, Mr. Hassan. I have allowed you to make this statement that you wanted to today. And I have no problem with that. But you need to understand a few things about the hearing we will have in the future. We will set the time in awhile. And that is that it will be an argument under the rule of law. With all due respect, this person you mentioned, whose case you are following, enemies of Islam, leaders of Pakistan, I don't, respectfully, care about those things. I am interested in whether, under the law, as I understand it, in the State of Utah, in the United States, you are entitled to a new trial. So when we come back, that's what I am going to restrict you to.

Tell me a little about yourself. I understand you have a college degree and an MBA, is that correct, or Master of

Public Administration?

THE DEFENDANT: I have a Master's of Commerce from back home, and a Bachelor's of Marketing.

THE COURT: Do you have any experience with the legal system, at all, other than what you have been through in regard to this case? I know the history of this case, and so on. But other than this case, do you have any familiarity with the legal system?

THE DEFENDANT: No, sir, I don't.

THE COURT: Have you, since you have been, since last July, have you been studying the law in prison, at all?

THE DEFENDANT: No, sir.

THE COURT: Do you understand the Rules of Criminal Procedure, what is required to demonstrate and what is required for you to show, to justify a new trial?

THE DEFENDANT: I believe I can follow some guidelines of the motion of new trial which was filed by Mary Corporon, though she did not mention all the facts in that. I believe that I have seen what Mr. Parker's arguments is, and I can very well cover them by reasoning. The only reason I have to take charge of this case myself is that I don't have a Muslim representation. Unless I am entitled to get a Muslim representation or counsel from outside the state, from Los Angeles or something, which I don't know, I don't trust the legal system over here.

THE COURT: You are certainly entitled to hire any attorney you want to represent you. But I am not going to appoint anyone else, simply given the history of this case. Mr. Hassan, you need to understand that, in my opinion, it is a mistake for you to represent yourself at even this type of hearing. It is fairly restricted. The things I am going to consider are fairly restricted. I am simply going to consider if there are proper grounds that justify a new trial. Many of the things you have mentioned today, I have seen in writings that you have provided to the Court, and that Ms. Updike, at least they are signed by Elizabeth Updike, have provided to the Court, the case history and so on. Many of the things you have said, I have seen in some form or close to that form. Most of those, Mr. Hassan, will not be considered in this argument. So I think it is a mistake for you to pursue it yourself. But you are certainly entitled to represent yourself, and the Court and our legal system can't force an attorney upon you. But you should only do that and I will only allow it if I am convinced that you are able to do that.

Now, it is obvious to me, not only from just your education, but from seeing the history of this case and seeing you here today, and hearing you, that you are an intelligent person. But I don't know that you have a full grasp of what Rule 24 is of the Utah Rules of Criminal Procedure, which is the rule that dictates what is required to be shown to justify

a new trial.

But, Mr. Parker, anything else that you think I ought to inquire about with Mr. Hassan? I understand there is that case *State vs. Frampton*. I haven't read it for some time. I should comply with in terms of allowing someone to represent themselves. Any other suggestions?

MR. PARKER: I also haven't read *Frampton* for awhile. I think the Court, basically, covered it. I understand *Frampton* required the Court to indicate the difficulty, of some of the problems, make a strong recommendation that he do it, himself, consider his experience and his intelligence, and I think the Court has done all of that. I think it is sufficient to allow Mr. McCaughey to withdraw, and allow him to represent himself.

THE DEFENDANT: Your Honor, may I?

THE COURT: Yes, go ahead.

THE DEFENDANT: Considering what you told me, considering especially what you told me about getting a Muslim counsel, my understanding was -- I don't have much knowledge of the legal system. It is extremely hard to get an attorney outside Los Angeles -- outside Salt Lake or Utah. And I was trying to get an attorney from Los Angeles. I don't want to waste the time of the Court, and I am in prison, anyway, if it is appropriate, I could be given like a month or so, and I can make a final attempt with my parents and my consulate general

and see if I can hire a Muslim counsel within a month or month and a half or something, if possible. If not, then I am willing to.

THE COURT: Someone give me their best estimate, if Ms. Campbell has retired, when do you think a transcript can be available? Anyone?

MR. PARKER: I would suggest we set it for a couple of months. I guess it was just a day.

THE COURT: Then brought back the next day for the ruling.

THE DEFENDANT: It was scheduled for two days, but it took only one day.

THE COURT: I don't know if Ms. Campbell is still around. I am assuming she is. My experience, generally, is we could get that transcript and so on within 30 days or so, assuming she is around here. So what I am going to do, Mr. Hassan, is schedule a hearing about 60 days away from now. If you can hire your own attorney, you can give that attorney this date. If you can't or don't, then you be prepared to argue that, yourself. We will get that transcript to you as soon as it is available. I can't say when that is. I think everyone is at a bit of a disadvantage as far as knowing exactly when we can get that. But that would still be ample time for you to prepare for that.

So I will find that Mr. McCaughey has a basis to

withdraw, and I will allow him to withdraw. I will find that, for the purposes of this argument, where there will not be evidence presented, where there will simply be argument, and you were present at the trial and testified at the trial, that you, Mr. Hassan, are able to represent yourself at that hearing. And I will allow that. Believing, as I do, that you are capable of arguing and understanding Rule 24, basically have to show that an injustice was done at the trial.

So I will allow you to represent yourself. I will ask Mr. McCaughey, before he leaves, to do whatever he can to file the necessary papers to order that transcript. And then he will be off the case. The transcript will come to you.

THE DEFENDANT: Your Honor, just I want to apologize the heat which was coming, with all due respect, you know, I have nothing against someone in particular or something. But I do want to say that, for the heated argument, heated things which have been inside of me, what I said, but there is no offense, I don't want you to take any offense towards you or something, please.

THE COURT: I don't easily take offense, Mr. Hassan. But at the argument I will again expect you to confine yourself to those things that are relevant. But I am not going to cut you off, probably. Don't worry. Let's get a date about 60 days away.

THE CLERK: We could do that the morning of

October 11.

MR. PARKER: That's fine with the State, your Honor.

THE CLERK: That would be at 8:30.

MR. PARKER: October 11 at 8:30?

THE CLERK: Yes.

THE COURT: If, Mr. Hassan, we run into trouble and don't get a transcript about 30 days before that, then we will make sure you know about it. But we may have to change that.

THE DEFENDANT: Your Honor, just the last thing, I would also like my transcripts -- I know it is not the Court's responsibility, but I want the transcripts to be given to my parents. I am willing to pay the cost. The only thing, it would take a little bit more time. I don't know if the Court can directly send the transcripts, because they are working on my case. And also I need all my -- all the material Mr. McCaughey has on my case.

THE COURT: I am sure Mr. McCaughey will return that. As far as transcripts to anyone else, you will have to take care of that. You can certainly get a copy to your wife or anyone else you would like, and they can take care of that. We will see you back here on the 11th at 8:30. Again, if there is any difficulty with this transcript, we will certainly keep you advised of that.

THE COURT: UH-HUH.

THE DEFENDANT: I'M GOING TO BE VERY CLEAR, THIS IS NOT A THREAT AT ALL, THIS IS MY FEELING, THIS IS THE WAY I PERCEIVE BECAUSE OF, I WANT JUSTICE TO PREVAIL ONE WAY. I'M SIMPLY ASKING FOR JUSTICE. I'M NOT SAYING, GET MY RELIEF BECAUSE THEY HAVE OFFERED ME MY RELIEF ALL THE TIME, I'M NOT TAKING IT. I'M JUST SAYING I NEED JUSTICE. SO KEEPING THAT IN MIND, I DON'T WANT FURTHER DELAY, I WANT YOU TO PLEASE UNDERSTAND THAT THE TIME IS OF A REAL SENSE RIGHT NOW AND THE EARLIER IT'S DONE THE BETTER IT WOULD BE. THESE ATTORNEYS, IF THEY CAN BE CONTACTED AND THEY CAN COME, WHATEVER NEEDS TO BE DONE, WE CAN ALL WORK IT TOGETHER TO TRY TO RESOLVE THE SITUATION. I CAN TELL HIM WHERE I'M COMING FROM SO HE CAN GET HIMSELF PREPARED.

THE COURT: WHY DON'T YOU DO THAT.

THE DEFENDANT: OKAY. SOME OF THE THINGS I WOULD SAY, WHICH MARY CORPORON DID MENTION VERY CLEARLY, LIKE YOU SAID WE WOULD, YOU KNOW, TALKING ABOUT OTHER THINGS, THE BIGGEST THING IS RULE 24 OF UTAH CRIMINAL PROCEDURES. AND IT SAYS, "IN THE INTEREST OF JUSTICE IF THERE IS ANY ERROR OR IMPROPRIETY," CAN YOU UNDERSTAND ME OKAY? "IMPROPRIETY WHICH HAD A SUBSTANTIAL ADVERSE EFFECT UPON THE RIGHTS OF A PARTY." AND THEN THERE ARE A COUPLE OF THINGS WHICH HAVE BEEN SAID ON SOME OTHER CASES WHICH HAVE BEEN MENTIONED, STATE V WILLIAM, STATE V SMITH. OKAY.

THERE ARE FOUR GROUNDS WHICH I AM APPLYING FOR. THEY ARE VERY CLEAR. THERE IS NO DOUBT ABOUT THEM. THERE IS NOTHING PECULIAR OR HIDDEN ABOUT THEM.

THE FIRST GROUND, THE REASON FOR A NEW TRIAL, AND YOUR HONOR, I'M SORRY, I'M NOT TRYING TO REMIND YOU OF YOUR JOB OR WHATEVER, I'M SAYING THERE ARE THREE OUTCOMES WHICH I PERCEIVE OF THIS HEARING. ONE IS THAT I DON'T GET GRANTED THE RETRIAL. THE OTHER IS I GET GRANTED A RETRIAL. THE THIRD ONE IS, WHICH IS CONSIDERING THAT JUDGE STIRBA IS DECEASED RIGHT NOW, THE THIRD IS THAT EVERYTHING GETS DISMISSED AGAINST ME. AND I'M KEEPING ALL THOSE OPTIONS IN MIND.

THE REASON FOR RETRIAL, ONE OF THEM, THE FIRST ONE IS THE NEW EVIDENCE WAS FOUND, MY ALIBI WITNESS. MR. PARKER, I WILL COME TO HOW HE'S APPROACHING THAT, THAT SHE WAS NOT ALIBI WITNESS, AND WHATEVER, I WILL COME TO THE POINT IN A SECOND.

AND HE ALSO SAID THAT NEW EVIDENCE WAS NOT NEW EVIDENCE, I KNEW IT BEFORE, AHEAD OF TIME. THAT IS NOT THE CASE. THAT IS NOT THE TRUTH.

THE OTHER ONE IS INEFFECTIVE ASSISTANCE OF COUNSELS. THERE ARE A LOT OF LIES. I HAVE BEEN KEPT IN DARK FOR A LOT OF THINGS. THE KEY WITNESSES HAVE BEEN DITCHED OUT OF DEBT. THE WAY WE PERCEIVE THINGS, THE WAY WE WANTED TO PRESENT IT, WAS NOT PRESENTED THE WAY IT WAS. I WILL ADDRESS IT IN A LITTLE BIT.

THE THIRD ONE IS A SURPRISED LIE FROM THE ALLEGED

VICTIMS.

THE COURT: A SURPRISED LIE?

THE DEFENDANT: LIE, YEAH. I DON'T KNOW HOW TO PHRASE IT IN A LAW TERM, BUT THERE'S SOMETHING LIKE THAT'S A SURPRISE LIE WHICH IS AS CLEAR AS DAYLIGHT. THESE PEOPLE REPEATEDLY LIE AND JUDGE STIRBA, OR THE BIGGER JUDGES, JUDGE BURTON, COULD NOT PICK IT UP. THE WAY IT IS IS THAT THE THING WHICH I'M CHARGED WITH IS BY ANY LAW OF PHYSICS, ANY LAW OF SCIENCE, ANY LAW OF LOGIC IS IMPOSSIBLE. IT IS 100 PERCENT IMPOSSIBLE. I CAN PROVE THAT. I WAS GOING TO PROVE THAT AT THE TIME. WE ARRANGED EVERYTHING BUT MY ATTORNEY DID NOT DO IT. AND I AM AS CONFIDENT AS I'M SITTING OVER HERE THAT I CAN PROVE IT, THAT THESE THINGS ARE IMPOSSIBLE FOR ME TO BURGLARIZE SOMEBODY CONSIDERING OTHER FACTORS.

AND THE FOURTH ONE IS THE PROSECUTORIAL MISCONDUCT, WHICH GOES TO MR. PARKER. THE FIRST THING IS HE KNEW THAT THE STATE DID NOT HAVE CASE, HE KNEW FROM THE VERY FIRST DAY, THE POLICE KNEW FROM THE VERY FIRST DAY. MR. BURNINGHAM KNEW FROM THE VERY FIRST DAY. MR. BURNINGHAM LIED QUITE A BIT TOO. AND I WILL DO MY BEST TO PROVE -- THE PROBLEM IS, YOUR HONOR, I DON'T KNOW WHO BELIEVES IN GOD AND WHO DOESN'T BELIEVE IN GOD NOWADAYS. THEY CAN LIFT THEIR HAND AND SAY WHATEVER THEY WANT TO SAY AND JUST SIT UP HERE SURPRISES ME HOW EASILY THEY LIE. SO I DON'T KNOW WHAT ELSE WOULD MAKE SOMEBODY TELL THE TRUTH.

PROSECUTORIAL MISCONDUCT, OTHER THAN, BUT THERE ARE A

LOT OF OTHER THINGS, BUT THE KEY THING WHICH I WOULD MENTION IS MY RE-INCARCERATION, WHICH WAS WHEN I WAS PUT BACK INTO THE CUSTODY A SECOND TIME AND MY BAIL WAS RAISED SIX TIMES TO 125,000.00. I WAS NOT A THREAT, YOU KNOW, BUT FOR WHATEVER REASON MR. PARKER AND MR. BURNINGHAM CONVINCED JUDGE BURTON THAT I AM A THREAT TO SOCIETY. CONSIDERING THAT I DON'T HAVE A VIOLENT PAST, NOT EVEN CONSIDERING WHATEVER THE PAST YOU SEE, WHAT YOU SEE SOMETIMES IS NOT THE TRUTH. THE DEPOSITION WAS NOT FOUND ON THOSE THINGS. THE THING WHICH YOU HAVE FOUND SOME CHARGE ON WAS THE SAME REASON I TOOK A PLEA BARGAIN BECAUSE I DIDN'T WANT TO WASTE MY TIME, THE KIND OF CHARGE WHICH I HAD FOR DISTURBANCE OF PEACE, OR SOMETHING. THAT IS NOT A MAJOR CHARGE ANYWAY.

THE RE-INCARCERATION, THE WAY IT AFFECTED, I'M GOING TO EXPLAIN IT TO YOU, THE WAY IT AFFECTED, IS MALEENA, AND I WILL CALL HER ALIBI WITNESS, BECAUSE ACCORDING TO MR. PARKER ALIBI WITNESS IS THE ONE WHICH TELLS THAT THE PERSON WAS NOT THERE PRESENT, PHYSICALLY PRESENT, AT THE SPOT OF CRIME AT THAT CRITICAL TIME. THAT IS EXACTLY HIS DEFINITION.

AM I RIGHT, MR. PARKER?

MR. PARKER: HM-HM.

THE DEFENDANT: WHAT I'M SAYING IS THAT SHE SAYS SHE WAS WITH ME AT THE TIME. SHE SAYS EVERYTHING, HOW WE WENT OUT, FOR HOW LONG I WENT OUT, I CAME BACK, AND SHE PUTS ME IN MY OWN APARTMENT AT THE TIME. THAT MEANS I WAS NOT IN THE OTHER

PEOPLE'S APARTMENT. THAT IS AN ALIBI WITNESS BY ANY SENSE OF LOGIC. IF A WITNESS IS SAYING I WAS NOT ON THE OTHER SIDE OF THE DOOR, I WAS ON THIS SIDE OF THE DOOR, THAT MAKES ALIBI WITNESS.

WHAT HAPPENED WAS, I HAPPENED TO, WHEN I WAS OUT FOR A WEEK, I HAPPENED TO GET HOLD OF MALEENA A DAY OR TWO BEFORE ALL THIS HAPPENED. I GOT REINCARCERATED. I KNOW THERE'S SO MANY THINGS, I AM TRYING TO CONFUSE THE COURT HERE. FIRST THING WHAT HAPPENED WITH MR. BURNINGHAM HAS CLEARLY LIED ABOUT IS WHEN HE CAME ON FRIDAY, THE 4TH OF JUNE, 1999, WHEN I WAS IN SALT LAKE COUNTY JAIL, I WAS IN THE SUICIDE SECTION SO I COULD NOT MAKE ANY CALLS OR NOTHING. I WAS TOTALLY BANNED FROM EVERYTHING. I HAD NO WAY TO GET AHOLD OF MALEENA AT THAT TIME. MR. BURNINGHAM CAME THE NEXT DAY OF MY INCARCERATION, THE FIRST INCARCERATION, AND I TOLD HIM EVERYTHING. I WAIVED MY RIGHT TO MIRANDA AND I TOLD HIM THIS IS WHAT HAPPENED, THIS IS WHAT HAPPENED AND EVERYTHING, AND HE SAID IF YOU HAVE NOT DONE IT WE DON'T WANT YOU IN HERE. I CLEARLY TOLD HIM ABOUT MY ROOMMATE AND I CLEARLY TOLD HIM ABOUT MALEENA.

IN THIS TRIAL TRANSCRIPTS HE HAS SAID CLEARLY THAT HE WAS NOT ABLE TO GET HOLD OF HER. THEN HE SAID THAT I NEVER GAVE HIM THE PHONE NUMBER. HE WAS NOT ABLE TO GET AHOLD OF HER. HOW, IF I WOULD NOT HAVE GIVEN HIM THE PHONE NUMBER, HOW WOULD HE GOT HOLD OF SOMEBODY NAMED MALEENA? BECAUSE THAT'S AS CLEAR AS DAYLIGHT, CRYSTAL CLEAR, THAT I DID GIVE HIM THE PHONE

NUMBER. AND I EVEN MENTIONED IT, I STILL REMEMBER THE PHONE NUMBER. AND I MENTIONED IT IN THE TRIAL TOO. I HAVE GOOD MEMORY, YOUR HONOR. I REMEMBERED ALL THOSE THINGS. PEOPLE THINK I'M MAKING THINGS UP BECAUSE OF THAT BUT THAT IS KNOWN FACT.

HE ALSO PROMISED ME THAT HE WOULD COME BACK ON MONDAY, THE FOLLOWING MONDAY. HE NEVER DID. HE ALSO WAS SUPPOSED TO BE INVESTIGATING THE CASE A LOT MORE IN DETAIL, FINDING ALL THE PHYSICAL, AND HE HAS CLEARLY MENTIONED, I DON'T HAVE THE POLICE REPORTS BUT HE CLEARLY MENTION OVER HERE THAT HE NEVER WAS ABLE TO GET TO ANY OF THE PERSON, ANY OF MY ALLEGED VICTIMS. AND NOTHING AT ALL. AND STILL THEY END UP FILING CHARGES WITHOUT ANY REASONING, WITHOUT FINDING OUT ANYTHING, THAT ANYTHING IS BASED ON TRUTH.

ON THE OTHER HAND, THE ONLY WITNESS I HAD, HE HAD NEVER EVEN GONE TO HER.

YOUR HONOR, YOU TELL ME WHAT KIND OF CIRCUMSTANCE DOES IT MAKE, YOU TELL ME A NAME OF A PERSON, YOU SAY GO AND CONTACT MR. MAURO OR SOMETHING, OR WHATEVER THIS ATTORNEY'S NAME IS, YOU'RE TELLING ME TO GO AND CONTACT HIM, AND WITHOUT GIVING ME THE ADDRESS OR PHONE NUMBER OF THE PERSON, YOU TELL ME, HOW COULD I FIND THAT PERSON? MR. BURNINGHAM CLEARLY SAID I WAS NOT ABLE TO CONTACT HER. I HAVE GIVEN HIM THE PHONE NUMBER. WHY WOULD NOT I GO -- IT'S JUST LIKE TOTALLY LOGICAL.

WHAT HAPPENED WAS, NOW I AM GOING TO COME BACK, I WAS

ABLE TO GET AHOLD OF MALEENA A DAY BEFORE MY SECOND INCARCERATION. SHE TOLD ME, I ASKED HER, I SAID, SHE WAS NOT NERVOUS, SHE IS A FOREIGN STUDENT AND STUFF, SHE WAS RELUCTANT, WHATEVER I SAID, YOU KNOW, THIS IS GETTING A BIG ISSUE, YOU WERE WITH ME, ALL YOU HAVE TO DO IS TESTIFY AND STUFF LIKE THAT. SHE SAID, I HAVE TO GO TO WORK RIGHT NOW, WHEREVER SHE WAS WORKING, WHY DON'T WE GET TOGETHER IN A COUPLE OF DAYS. AND I SAID FINE, YOU KNOW. I WAS WORKING AND DRIVING MY CAB TOO.

NEXT DAY I CAME OVER HERE IN FRONT OF JUDGE ATHERTON AND WAS PUT BACK INTO THE JAIL. WHATEVER, YOU KNOW, HER PHONE NUMBER, DID NOT ACCEPT COLLECT CALLS OR WHATEVER, BUT THE THING IS, I COULD NOT GET HER. NOW THEY TELL ME WHOSE FAULT IS THIS. MR. PARKER IS THE ONE WHO CONVINCED, OTHERWISE THAT WITNESS WOULD HAVE COME IN FRONT OF IT. MR. PARKER WAS THE ONE, OR MR. BURNINGHAM DID PUT ME INCARCERATION AGAIN, WHICH WAS EXTREMELY ILLEGAL, I WOULD SAY, BECAUSE THERE WAS NO REASONS. I WANT TO KNOW WHAT REASONS. ALL THEY DID IS LIKE PERCEIVE A PICTURE INTO A CERTAIN MIND THAT MAYBE I'M A TERRORIST OR SOMETHING, WHATEVER THEY WANT. THIS PERSON IS A DANGEROUS INDIVIDUAL, HE'S THIS, HE'S THAT, BLAH, BLAH, BLAH. AND LIKE STATE ALWAYS DO, JUDGES, YOU KNOW, YOU GET PAID BY THE STATE, AND ALWAYS TAKE THE STATE'S SIDE. AND THIS IS AN OPEN FACT. EVERYBODY KNOWS ABOUT IT. THAT IS THE REASON I'M TIRED OF YOU USING THE SYSTEM, OR WHATEVER.

OTHER THAN I TRIED TO CONTACT MALEENA AFTER THAT SEVERAL TIMES WHEN I GOT OUT AGAIN, AFTER ONE MONTH, THROUGH RON YENGICH. I WENT TO HER HOUSE, I CALLED HER PHONE NUMBER, IT WAS DISCONNECTED, THEN WE TRIED SO MANY TIMES, EVEN WHEN I MARRIED MY WIFE AND STUFF LIKE THAT, ME AND MY WIFE TRIED TO FIND HER, WE DID EVERYTHING TO FIND HER. MY FATHER-IN-LAW DID EVERYTHING. THESE PEOPLE ARE ALL THE WITNESSES. THEY DID EVERYTHING TO FIND HER. WE COULD NOT FIND HER. ALL WE COULD FIND IS HER ROOMMATE WAS LIVING ON THIS VISA THAT SHE LEFT SOMEWHERE TO CALIFORNIA OR SOMETHING. THEY DON'T EVEN SPEAK MUCH ENGLISH BECAUSE THEY'RE...

I DON'T KNOW HOW FAR I SHOULD GO OFF INTO THAT DIRECTION.

THE COURT: I THINK IF YOU GIVE MR. PARKER, AS YOU'VE DONE, A LITTLE OVERVIEW OF WHAT YOU'RE GOING TO DO THAT HELPS HIM KINDA BE PREPARED. I THINK OUR NEXT STEP MAYBE IS TO GET A DATE AND MAKE SURE MR. MAURO AND/OR MR. SIKORA GET TO YOU SO THAT THEY CAN BE READY, I WOULD THINK. ISN'T THAT OUR BEST BET?

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: I MEAN, AT THIS JUNCTURE WE'LL JUST BE TALKING ABOUT WHAT MAY OR MAY NOT HAPPEN AND WE WON'T MAKE AS MUCH HEADWAY --

THE DEFENDANT: YOUR HONOR, JUST I UNDERSTAND WHERE YOU'RE COMING FROM AND I'M NOT LIKE -- IF YOU GIVE ME A FEW

PROCEEDINGS

THE COURT: Okay. Mr. Garcia, are you ready?

MR. GARCIA: Yes, your Honor, I'm here--I've been called here on the Hassan--

THE COURT: Oh, you have, huh?

MR. GARCIA: Yes.

THE COURT: Well, he's probably back there.

Okay. Mr. Garcia?

MR. GARCIA: What's going on, Judge?

THE COURT: Well, the best I could know is, if I understand it right, Mr. Hassan, you had an attorney named Mauro and Mauro got accused by you of stealing stuff. The Bar took your complaint seriously and is now chasing Mr. Mauro. Mr. Mauro has to withdraw because you've made it so that he can't represent you.

And so I guess, Mr. Garcia, you must be one of the conflict attorneys?

MR. GARCIA: I am.

THE COURT: So, you're here because Mr. Hassan sort of needs an attorney, but I don't know, do you want one, Mr. Hassan? I'm never really sure what you want.

MR. HASSAN: Okay. Your Honor, the way it stands right now, I'm (inaudible) I go through that letter of--

THE COURT: What letter?

MR. HASSAN: You don't get the letter?

THE COURT: No.

MR. HASSAN: What letter? Okay.

I--I wrote you the one letter--

THE COURT: Recently?

MR. HASSAN: Yeah, recently.

THE COURT: You told me you wouldn't do that anymore.

MR. HASSAN: I know. That's what I wrote in the letter, that I didn't have a choice once you dropped the case and all, and I told you what--what I'm planning to do.

THE COURT: I don't know that I saw--I haven't seen that.

MR. HASSAN: Okay. Well, then I--

THE COURT: And I wouldn't be sitting in here if I dismissed it?

MR. HASSAN: Okay. Then, my--because--

THE COURT: What's the letter say?

MR. HASSAN: It basically says that--that what happened with--with Mauro and stuff, you know, and I didn't--I didn't have a choice to--other than writing you and letting you know what my intentions are. And--

THE COURT: What are you intentions right now?

MR. HASSAN: My intentions are, for right now is to go ahead and--and--and go to proceedings right now, whatever I

have already because I have delayed my Board of Pardon date and stuff like that and it's been going on for too long. And if it goes--because if I--I get approved or I don't get approved, whatever it is, you know, I--I need to just go ahead and--with the proceedings today.

THE COURT: Do you want Mr. Garcia to help you?

MR. HASSAN: He might not be familiar with my case so I--

THE COURT: I'm certain he--I'm certain he knows nothing about it.

MR. HASSAN: He--

MR. GARCIA: I don't even know that much.

THE COURT: Huh? He doesn't even know nothing--nothing.

MR. GARCIA: Right.

THE COURT: He's here because as people who took Mauro off, told him to come and fill in, so he doesn't know, he can't help you--

MR. HASSAN: Yeah. That's what I'm saying. I am ready with the proceedings, with whatever little bit (inaudible) because Mauro is not here, you know. I'll--I'll mention it to you, but we need to get going now, you know, it's--

MR. GARCIA: Where are we in the proceedings?

THE COURT: Well, Mr. Mauro was investigating, if I

understood right, you had given him the name of a couple of witnesses that will support some things that you thought had gone awry.

MR. HASSAN: Yeah. But then--then--

THE COURT: And then he tracked down one of them and was looking for the others when you said he stole some of your stuff.

MR. HASSAN: Yeah. But that's (inaudible) and I have reasons for what he did, I took--told him not to deceive me and be--be reasonable and be up front with me and I told him to--I gave him documents, made four copies to (inaudible) and continued request, you know, I have a 4:00 o'clock hearing, I need those documents, he--he won't give it back to me.

THE COURT: Okay.

MR. HASSAN: And that's where the problems occurred, you know. I didn't have a choice but to go to the Utah State Bar.

At this point in time, that--that handicap is going to be there that we don't have the--those witnesses on--on the stand or something but I (inaudible) and I can--I can proceed to court with what I have and will.

THE COURT: Do--I mean, I guess I don't mind you going ahead. I don't know that--were you thinking we were going ahead today?

MR. PARKER: Well, it's actually set for a motion for--for the motion, but no, I didn't suspect that we were. The motions have been filed. I would suggest that maybe we take a little time for counsel to talk to the defendant and gather a little information, at least help him make that decision before we do proceed.

MR. GARCIA: Well, he wants to represent himself? You want--

THE COURT: He's kind of on and off wanted to do that, but it was--it's a motion for a new trial and I wasn't sure Mr. Hassan was going to navigate the waters as well as he could.

MR. HASSAN: You know, I--

THE COURT: And I don't want to take away his right. I mean, if he wants to--

MR. HASSAN: Like I said, I--I wrote you the letter and I was under the presumption that you had read that letter and that it was agreed with the State--

MR. PARKER: I didn't--

MR. HASSAN: --that I'm ready to proceed with--

THE COURT: I thought we were done with letters, so...

MR. HASSAN: Okay. Well, I--I understand what, you know, has happened, but the way I am right now, whatever things 'cause if the thing don't go the way I want it, then I

want to the appeal process and then--maybe then--(inaudible) Garcia--maybe then Garcia--or Mr. Garcia or something, you know, can--can help me but I want to get done with this step right now.

MR. GARCIA: You're on parole?

MR. PARKER: No.

THE COURT: No. He's in--he's got two one to 15--

MR. PARKER: Five to life.

THE COURT: Five to life, yeah, I guess, two first degree felonies. I think they're aggravated--

MR. HASSAN: Aggravated burglary, yeah.

But your Honor, I--

THE COURT: And he had a bench trial in front of Judge Stirba and was found guilty; is that--

MR. PARKER: That's correct.

THE COURT: Is my memory right?

MR. PARKER: That's correct.

THE COURT: And sentenced to the--I think they're concurrent; right?

MR. HASSAN: Yes, your Honor.

MR. PARKER: You shake a memory that's been too long.

THE COURT: Five to life.

MR. PARKER: Correct. That is correct.

THE COURT: So, he has five to life on--

MR. GARCIA: So, he was convicted on a bench trial and now he's moving to withdraw his pleas?

THE COURT: No. He's--he's wanting a new trial.

MR. GARCIA: Wanting a new trial.

THE COURT: Right. And I--

MR. GARCIA: Based on--

THE COURT: --I don't remember--

MR. PARKER: I have copies of the motion. What happened is that he's gone through several attorneys, some of the initial ones filed a motion for a new trial, I believe that was Mary Corporon, and we've been dealing with that motion since. And he's had several attorneys, each wanted to investigate and check into the motions--

MR. GARCIA: I see.

MR. PARKER: --before actually arguing the motions.

THE COURT: They don't get too far because Mr. Hassan and they--

MR. GARCIA: Don't get along.

THE COURT: --have a parting of the ways.

MR. HASSAN: Conflict. Yeah, I'm a hard person to get along with, I'm--

THE COURT: He's been real nice lately. He got in the face of one of the officers at the prison once, but lately, he's been really a good guy. He's quit threatening to blow me up, that's been a good thing; although I didn't take

him too seriously.

MR. HASSAN: Yeah, you did not.

THE COURT: No.

MR. HASSAN: Considering where I am, you know...

THE COURT: Well, that's kind of where I viewed it, yeah.

MR. GARCIA: Well, I'm probably harder to get along with than you are.

MR. HASSAN: Well, we'll have a good time then.

Your Honor, like I said, right now, I--I feel desperately in the need of getting the proceeding, you know, the--done. I'm sorry Mr. Parker is not ready or something, 'cause these are--we have set the date and I wrote you that letter, I--I--you know.

THE COURT: Because you assumed I'd read it, I don't--

MR. HASSAN: Well, you know what I am saying is that because it's a big situation. In order for him to get ready, it's going to take him three months more, I'm just ready.

THE COURT: No question that Mr. Garcia will want to spend a little time on it.

MR. HASSAN: Yes.

THE COURT: So, do you want to--say you want to go on your own? I mean--

MR. HASSAN: Yes, your Honor.

THE COURT: --I think you're clear enough minded, I know that you know the process well. Mr. Garcia would be happy to help you.

It would take a little while. I mean, I think Mr. Garcia would be reluctant to say, yeah, let's go today, there's a lot at stake for you and then Mr. Garcia has a--a duty to do the very best he can. So--

MR. GARCIA: I have an obligation to be competent.

THE COURT: Yeah. And so you can--he can't go ahead today and help you. I don't think he could ever take that position.

MR. GARCIA: I know. That's what I'm saying. I would--

THE COURT: So, in your mind, if today is the day, then you're probably going to have to say, I don't want Mr. Garcia's help, I'm going to go on my own.

MR. HASSAN: Not at this point then, I don't want--I'm sorry, but I'm ready to--

MR. GARCIA: Nothing personal.

THE COURT: Mr. Garcia is not going to take it personally.

MR. GARCIA: May I be excused?

THE COURT: You may.

MR. GARCIA: Thank you.

MR. PARKER: I do think, your Honor, if he's going

to go on his own, we need to go over what is--seems to be known as the Frampton inquiries and that is to check with him to see if he understands what he's doing and the results and consequences and his inexperience to be able to represent himself.

THE COURT: Well, I kind of thought he--he had demonstrated that before, but I mean--

MR. PARKER: I think we at least ought to go through the questions and inquire of him, whether or not the answer is obvious.

THE COURT: All right. Well, let me try that, Mr. Hassan.

You, at this juncture, you're clearly not able to hire an attorney, you can't go out and pay for one?

MR. HASSAN: No. I can't.

THE COURT: Okay. So, we know that's a fact, 'cause you've been in custody for like three years now.

MR. HASSAN: Two-and-a-half.

THE COURT: Two-and-a-half. All right.

So, you'd be a person to whom we could appoint an attorney and you understand we'd do that if you wanted, the State would pay for your attorney. You've decided today, if I understood you right, you don't want the attorney's help.

MR. HASSAN: Yes, sir.

THE COURT: And so, do you feel like you're

competent to go ahead and help yourself?

MR. HASSAN: I'm pretty sure I'm competent.

THE COURT: You understand that Mr. Parker is trained in the law and that he knows what's going on and in theory--

MR. HASSAN: Yeah. And I--

THE COURT: --I'm trained in the law and I'm supposed to know what's going on.

MR. HASSAN: Yeah.

THE COURT: And so you're the only one of the three of us in--

MR. HASSAN: I know I've got a--

THE COURT: --theory--

MR. HASSAN: --handicap or whatever, but I have been there, done that, I--I just don't want to have any more attorneys that won't do what I want and--

THE COURT: Okay.

MR. HASSAN: --just keep on going.

THE COURT: Now, you obviously have other remedies besides this new trial. And I think you've talked about it, you want to appeal something,--

MR. HASSAN: Uh huh.

THE COURT: --which is fine, because you understand you've got to get this one out of the way first before you go that step; but you understand that if you go ahead and because

you aren't as experienced and able, you might be giving away opportunities or rights that other folks have?

MR. HASSAN: Yeah. I--I'm aware of that, the--the--like I said, the only handicap which I'm having with not having attorneys is those--that those people are not subpoenaed, and but I have--I have those statements and stuff that what I will present, but otherwise, you know, they would have been subpoenaed. That's something which the Court should keep in mind, you know, that I don't have--you know, I tried everything to get those people subpoenaed.

THE COURT: Well, but I mean, so that brings up a very good point. I mean, you're giving up the right to have folks come in and give testimony in your behalf, not in your personal behalf, but in behalf of a motion that you bring.

And is that a wise thing for you to do?

MR. HASSAN: Your Honor, I--I'm way sick and tired of the situation. I just do not have any more (inaudible) to be with attorneys, be it attorneys and--but they all make me look bad and I, you know, it just--whatever happens, it just--it's not--it's not that we (inaudible) different way or maybe I'm supposed to be representing whatever handicap I have, whatever I present, I'll present. I know that we're supposed to be (inaudible) and you know, it would be documented type stuff, you know, I--I assume. And I'm just saying I just want to bring all the (inaudible) I can bring and then from there

onwards, I just want the transcripts, you know, (inaudible) that's all, and then you (inaudible)

THE COURT: Okay. And I guess since you're just sick and tired, that's really why you're doing this; is that a wise thing to do? You're just kind of full of it--I mean tired of it and so on.

MR. HASSAN: It's a--it's--the thing is that the way I--I can present myself, the way I know the cases, the way I know the situation is much better than--than the way other attorneys know and the way they--I called earlier to bring all those things which I wanted him to bring, you know, so it's--it's always going to be a handicap because I'm--I'm fighting this (inaudible) misconduct and so attorneys don't want to fight against their own (inaudible)

THE COURT: I gotcha. All right. Well, you're comfortable with what you're doing?

MR. HASSAN: Yes.

THE COURT: Mr. Parker, should we ask him anything more?

MR. PARKER: No. I--I think that's sufficient, your Honor. I would place on the record that we have been here numerous times and had discussions with the defendant about various aspects of this proceeding and he's written both the Court and myself and other people numerous times also expressing his desires.

THE COURT: True.

MR. PARKER: So, I think given all that, he shows and presents and understanding of the procedure and--and at least an understanding of what he wants to occur and the way he wants it to occur.

THE COURT: I'd agree with that conclusion. All right. Well, we'll catch a few of these others, then we'll bring you out and then we'll talk about what we need to do.

MR. HASSAN: All right.

(Whereupon, the Judge handled unrelated matters.)

THE COURT: Bring Mr. Hassan out; right?

THE CLERK: Yeah. Just go get our (inaudible)

THE COURT: Are you okay, Mr. Parker, to go now?

MR. PARKER: Go ahead.

THE COURT: Let's go.

OFFICE: Your Honor, are you going to order him to be cuffed so he can access--

THE COURT: How do you feel?

OFFICER: I really don't know him. The other officer would be better asked, I've never had to deal with him. So far, he's never been a problem whatsoever.

THE COURT: Right. You know, there are just moments when he kind of gets angry and--

OFFICER: So, I would--

THE COURT: But usually, we see that early on, so--

Mr. Hassan, the officer was wondering if you should be uncuffed and I'm inclined to do what you think is the best.

MR. PARKER: Would it be appropriate to have one hand unrestrained so that if he needs to go through his property.

THE COURT: Well, I think it's fine. It's more of a concern--

OFFICER: Which hand do you right with? Right or left?

THE COURT: I mean, I want you to be doing what you should.

OFFICER: Making it our call, basically.

THE COURT: Mr. Hassan has always been good to--to me, but I'm worried about your job.

OFFICER: Yeah.

THE COURT: That's--you do it the way you need to.

MR. HASSAN: You know, I'm mellow today, don't worry about it.

THE COURT: Today you're happy, huh?

MR. HASSAN: I won't say I'm happy, you know, I'm--

THE COURT: Well, that's a bad word.

MR. HASSAN: Yeah.

THE COURT: But you're good, today.

How's your arm? You got hurt once, didn't you?

MR. HASSAN: I--I was--this is the fourth time my

hand has been broken in prison. Once on here and there, then my blood vessels, which police officers broke, then my hand broke from here, my finger broke. It's just a curse on me.

THE COURT: Mr. Hassan, we're here then to consider your motion for a new trial and we'd like you to begin, if you'd like.

MR. HASSAN: Won't there be any stenograph or something, your Honor?

THE COURT: No, and you know, I think what happened is, they got to the point where, on the first degrees, there's so few of them anymore, that unless it's a capital case, I don't think they come in.

Isn't that the method now, Marcy?

THE CLERK: Unless it's an evidentiary hearing.

THE COURT: Oh, okay. Unless we have witness testimony.

THE CLERK: Correct.

THE COURT: But we do have a tape and--

MR. HASSAN: Okay.

THE COURT: You wouldn't have a--(inaudible) I'll give you a tape and you can go home and listen to it. That won't work. But you know, they can make a record--or a transcript from the tape.

MR. HASSAN: They can?

THE COURT: Yeah. The tape runs on everything we do.

MR. HASSAN: Okay.

THE COURT: You see the camera?

MR. HASSAN: Yeah, your Honor, I--

THE COURT: And I don't know that you can see the T.V., but we're all on the tape.

MR. HASSAN: Yes, and I--

THE COURT: So, on every other case that they do transcripts, they do them based on the tape, so we're fine that way.

MR. HASSAN: Yeah. I would request a transcript for sure, you know, 'cause there are a lot of people interested in my case and stuff, you know, so--

THE COURT: I don't have a problem.

MR. HASSAN: --so if I speak--I'll speak--I'll try to speak slow so it can be heard and you know.

THE COURT: Yeah. And it's easier, like you say, for them to pick up what you're saying.

MR. HASSAN: Yeah. I know it's a--always a little bit situation.

THE COURT: I've gotten pretty good at understanding you.

MR. HASSAN: Yeah, I know.

THE COURT: And I really like the way you write now 'cause you're writing like a vernacular, you've got wanna, w-a-n-n-a.

MR. HASSAN: Oh, did--

THE COURT: Instead of want to, you wanna.

MR. HASSAN: Yeah. I'm learning the slang--

THE COURT: I don't know.

MR. HASSAN: Americanize and then you guys want to send me back home, you know.

THE COURT: There you are, see?

MR. HASSAN: Yeah. I'm--I'm becoming more like you and the rest.

THE COURT: Well, that's not good, you ought to go somewhere where you won't have that problem.

MR. HASSAN: Yeah.

THE COURT: Okay.

MR. HASSAN: Your Honor, just a couple of things. Let me start from the name of (inaudible) the merciful, a couple of things I just say before we proceed and it won't be wrong at all. This time, I have--and I--I've written more things like in writing so I don't go out of line and you know, and just start talking all those--

THE COURT: Okay.

MR. HASSAN: --what I (inaudible) things, you know. And I'm just going to pretty much read what I have written to you and stuff.

THE COURT: But just do that clearly and as fully as makes sense to you.

MR. HASSAN: That's exactly what I was going to say. (Inaudible) a word I remember that you told me that I have to argue strictly on the grounds for a new trial, keeping in view the Utah Code Rule No. 24 for--for reasoning. And a couple of things which I wanted to mention, a couple of things I want to say on Mr. Parker, but I--I change my mind right now, so that's when I--you know--

THE COURT: Right. It's probably not--

MR. HASSAN: Yeah. Not good to piss him off right now.

THE COURT: Great.

MR. HASSAN: Okay. Yeah. Like I said, please don't rush me through the proceedings. English is my second, actually third language and I'm not a professional attorney, please keep that in mind.

THE COURT: I think we went over that.

MR. HASSAN: What's that?

THE COURT: No, I--I should shut up; you're reading your script to me.

MR. HASSAN: Okay. And it would make it make it easier for you and make it easier for me, you know, to--to read it because I'm more a philosophical kind of a person so I take a little bit of time explaining things and all, and I know American way is different, just--just boom, like this.

THE COURT: Okay.

MR. HASSAN: And having said that, I would remind all of you that this proceeding would be closely scrutinized by many Pakistani politicians and lawyers, so please--and this is--this is a request, you know, please, (inaudible) out of logic and not out of like--out of the answer like, you know, be like, I think (inaudible) involves a little bit more, you know, more personally, you know, like--like, you know, just give me the reasonings, this is the reason you are denying it, this is the reason you're accepting it, you know, that's--I--I'm not trying to tell you your job, but this makes life easier for me, you know.

THE COURT: Well, I think so you'll know, I--if I'm going to do it right, I have to do that.

MR. HASSAN: All right.

THE COURT: I have to give some reasons for what I do.

MR. HASSAN: Like I said, my experiences are bad; so once bitten by a snake, a person is always scared of (inaudible)

THE COURT: I--I'm with you.

MR. HASSAN: Okay. Let's start over here, these are some of the opening arguments. Your Honor, one more time for the record that if Judge Stirba died, I'm sorry she did and all, that is not my fault.

THE COURT: No. Nobody ever thought it was.

MR. HASSAN: All right. So, what I'm saying is, I believe that you're more or less a substitute for Judge Stirba, because see, if she would have been alive, then I--I would have been going back to her for this hearing, you know.

THE COURT: Very sure.

MR. HASSAN: So, if she is not alive, then you are the substitute judge and all.

THE COURT: Okay.

MR. HASSAN: And because of that 'cause I--I--I read some of your--in the letter you send me and you know, I appreciate that (inaudible). I personally believe that you do have a discretion to overturn the verdict.

THE COURT: Right. I think if I mis--I--what I don't have discretion to do is, once you're in the prison system, to do something with--tell them what to do.

MR. HASSAN: Yeah. Okay. That is a misunderstanding.

THE COURT: But you're right, we--if we're talking about setting aside the verdict and granting a new trial, that clearly is within my province, right.

MR. HASSAN: Yeah. And--and plus, like I said, Judge Stirba also has the jurisdiction to the best of my knowledge, that she could say, okay, you know, the things are so clear, there were things that were not brought up, things are so clear, there's no point of going to trial anymore,

let's drop all these (inaudible)

THE COURT: Okay. And now I'll be candid with you, Mr. Hassan, I don't think I could ever do that.

MR. HASSAN: Okay.

THE COURT: Because I would have had to have heard the trial, and because I am the successor to her, I don't think there's any hope at all that I will say, gee, based on what he's told me and not having heard the trial, I will now find him not guilty and dismiss the case. I could not do that.

MR. HASSAN: Okay. But it's a--but it is a--in--in--in the--by the--by the books, you know, and by the law, you do have the discretion, that's all what I want to say. You--you might not do it, that's a separate thing; but Judge Stirba has the discretion.

THE COURT: Right. I think she had it and it doesn't make sense for me to try and do that, because I was not at the trial, I never saw a single witness; so I mean, for me to do what you ask--

MR. HASSAN: I--I understand, your Honor. What I'm saying is, don't you think that it's a disadvantage for me that now Judge Stirba is dead, you know, so I have lost that opportunity.

THE COURT: Oh. I mean, like you say, it's not your fault, but there's not a thing anybody can do about that.

MR. HASSAN: All right. Okay.

Let's say one more thing. Most of the evidences have already been submitted to you, to the Court office (inaudible) and most important of all is the travesty of justice document.

I assume that you have scrutinized it as well as my preliminary hearings and my police discovery report, (inaudible) the findings, the--the motion which was--which was given to you by Mary Corporon and most important of all, my trial transcripts.

That's what I assume that, you know, in order, you know, for you to make a fair judgment today, you should have (inaudible) scrutinized those things.

THE COURT: Well, guide me just a tiny bit on why the trial transcript will be of benefit?

MR. HASSAN: Your Honor--

THE COURT: Well, you have to tell me that, that's part of what you're telling me, isn't it? So, I'll listen to that. Okay.

MR. HASSAN: Yeah, like I said, if--if--if--if anything, you know, which I've mentioned, you have not scrutinized through, you know, I know that--

THE COURT: No question I haven't read the trial transcript.

MR. HASSAN: Okay. If you have not read it, then--

then I would humbly suggest that we can do the proceeding, then--then please take time before you make the--

THE COURT: Well--

MR. HASSAN: --findings--

THE COURT: (Inaudible) that I should probably--if it's relevant, then I ought to--

MR. HASSAN: Exactly. The trial transcript is the key to my case, you know.

THE COURT: Okay.

MR. HASSAN: And you know how hard we worked to get it.

THE COURT: I'm getting you.

MR. HASSAN: I also want to bring to the Courts attention that in spite of my repeated requests and attempts to various attorneys, none of the people who would have helped this hearing have been subpoenaed. Those are the facts, we can delay it as long as we want and stuff, attorneys play games again and again and I don't want to expose this--not the--the--the case right now, but trust me to that, that they just do not want to fight, a lot of people have looked and taken my case. Being (inaudible) and how all these things are.

I also want to--

THE COURT: Do you mind if I--I mean, I--I just want to make it real clear, I am assuming that you don't want them

subpoenaed, because I don't think I've made it abundantly clear to you, but we have the power to have them come and if you want a subpoena issued for somebody and you want to have them present some evidence, then we have the ability to do that.

Now, you need to be clear in your mind--

MR. HASSAN: Okay.

THE COURT: --that you're giving up that opportunity. Now, what I don't want you to say, as you just did, is, well, I would have subpoenaed them if I could have, but I can't, so keep that in mind. I want it real clear, you have that opportunity and by not exercising it, you're giving it up.

MR. HASSAN: Okay. How about we put it this way? That I had their statements. If you think that those statements are not credible and stuff, I--at this particular time, I want to get the proceeding done, because eventually the attorney (inaudible) the way I want to do it. And if you think that those, you know, 'cause see, I have read some law books and they said, you know, either present, but just keep a little bit of that concern, you know, that of course, I'm not a regular attorney and so if you think that those things, subpoenas and stuff, you know, like--in my--my observation, what I have should give--get me a new trial. I don't have any--I'm a hundred percent sure on that.

THE COURT: Okay. Right.

MR. HASSAN: (Inaudible) But if you think that those things would have been heard in the end, you--you're not (inaudible) the statements I have, then we'll--we can talk about it after that.

THE COURT: Okay. I think I understand

MR. HASSAN: Yeah. Because you think, you know, yeah, if--if--if she would have, instead of writing it down, she would have been here and said all those things--

THE COURT: Right.

MR. HASSAN: --that that would have made a different picture in your mind, we can talk about that.

THE COURT: Okay.

MR. HASSAN: All right. And I don't know how Mr. Parker want to do it, I have everything written down, the (inaudible) and stuff, strictly by the Rule 24 and I can start reading it and start giving you the exhibits. That's the way I planned.

Does he want to make those objections right now or something like that and does he want to give this--

THE COURT: He would object if, at some point, it's appropriate.

MR. HASSAN: Okay.

THE COURT: He's there, paying attention.

MR. HASSAN: Okay. But--

THE COURT: But the blank look is the one he always has, so--

MR. HASSAN: Okay.

THE COURT: --we're not going to get any better than that.

MR. PARKER: Thank you very much.

MR. HASSAN: (Inaudible) you know, I don't know if you've seen the movie.

Okay. Let's start the proceedings, I will be handing over some exhibits and you know, I hope you can assist me in (inaudible) you can--(inaudible)

THE COURT: They pointed at you, Mack, that you would be helping bring up the exhibits.

UNIDENTIFIED SPEAKER: Yes.

MR. HASSAN: In the name of (inaudible) the merciful. Your Honor, the reason I'm in front of you today is to establish the foundation on my request for a new trial. First of all, I would like to submit to you the memorandum in support of motion for new trial, which has been document--documented by one of my previous counsels, Mary Corporon. Let us label it as Exhibit 1.

THE COURT: And are you able to leave these with us?

MR. HASSAN: Yes, your Honor.

THE COURT: Okay. May he?

UNIDENTIFIED SPEAKER: Pardon?

Addendum E

Findings & Conclusions
Denial of Motion For New Trial
(R1407:419-26; R5044: 194-201)

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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- REHAN HASSAN, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 991911407FS, 991915044FS Hon. Michael K. Burton

This matter came before this court for hearing on defendant's motion for a new trial on August 16, 2002 and continued on September 17, 2002. Defendant was present Pro se, having waived appointed counsel. Paul B. Parker, Deputy Salt Lake District Attorney, represented the State. A motion for a new trial with memoranda had been submitted in defendant's behalf by earlier defense counsel. The State also submitted memoranda. Witnesses were called and testified. Both parties argued the matter fully.

Having listened to the witnesses and having considered the written and oral arguments of both parties, this court makes the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. Defendant was charged with multiple counts of Aggravated Burglary and Assault in one information and a single count of Aggravated Burglary in a second information.

2. All the counts were alleged to have occurred at the same location The majority of the counts alleged the same two victims, J D and Carol Miller and occurred on May 29, 1999 The Millers alleged that defendant had kicked open the door to their apartment and had entered three times assaulting and threatening them During one of these entries, defendant had threatened the Millers with what looked like a small handgun Count number three an Assault, was alleged to have occurred on June 3, 1999 with another victim, Kathy Harris In that count, Kathy Harris alleged that she confronted defendant about a power cord he had plugged into the apartment building hall outlet. In response, defendant attacked her.

3. After separate preliminary hearings, the two informations were combined for trial and set before Judge Anne Stirba.

4. Defendant sought legal assistance and, because of a conflict with the Salt Lake Legal Defender's, Office Edward Montgomery was appointed to represent defendant.

5. Ed Montgomery investigated the allegations and defendant's alibi, talked with witnesses, reviewed police reports and hired an investigator

6. Prior to trial, Edward Montgomery filed a motion to sever count three, the Assault on Kathy Harris, from the other counts.

7. After filing the motion, defendant waived the jury trial.

8. Defendant talked with Mr. Montgomery and defendant's wife about the waiver. Defendant and Mr. Montgomery discussed the difficulties and benefits of a bench trial as compared to a jury trial. Defendant decided that Judge Stirba would be more favorable to defendant rather than a jury

that would not likely be able to relate to defendant's background and beliefs.

9. Ed Montgomery testified that he withdrew the motion to severe because it would not have made any difference since the judge who would be hearing the case knew the facts. (In spite of Mr. Montgomery's testimony, the court docket indicates that Judge Stirba heard but denied the motion.)

10. The day of the assault on Kathy Harris, police were called and took defendant into custody at the scene. Defendant was asked for identification. He stated that it was in his car but he could not say exactly where in the car it was located. Defendant eventually gave a police officer permission to enter the car to look for the identification. Once inside the car, while looking for the identification, the officer found and seized a gun shaped cigarette lighter. The lighter matched the description of the gun the Millers stated that defendant had threatened them with.

11. Mr. Montgomery did not file a motion to suppress the seizure of a gun shaped cigarette lighter from defendant's car.

12. The bench trial was held on May 15, 2000.

13. During the trial, Mr. Montgomery cross-examined at length both of the Millers about the inconsistencies in their testimonies, the unusual points of their testimonies, and he cross-examined Ms. Miller about her past conviction for Aggravated Assault against her husband. Mr. Montgomery also cross-examined Mr. Miller about the damage to the door and his attempts to repair the door. Mr. Montgomery cross-examined Detective Brad Burmingham about his failure to find a girl named "Malena," and

whether the door could have actually had been damaged so little as it was if it had been locked as the Millers described.

14. Defendant wanted to present the testimony of some locksmiths who would have testified that the door would have been damaged more if the door had been kicked in.

15. Mr. Montgomery refused to present the witnesses because he had previously checked with another expert who had said the damage was consistent with the Miller's description. In light of that, Mr. Montgomery chose, rather than a battle of conflicting experts, to cross-examine and impeach the police witness and Mr. Miller on the damage.

16. Mr. Montgomery also refused to introduce the testimony of some character witnesses that would have testified about defendant's good character. Defendant had a record of past assaults. Mr. Montgomery did not want to open the door to defendant's past assaults by introducing evidence of defendant's good character.

17. Defendant took the stand at the trial and testified that he had been using power from the apartment hallway outlets since his own power had been shut off. He admitted arguing with Carol Miller at her door about her unplugging or cutting his power cords. He also admitted arguing with Kathy Harris but said he had to push her out of his apartment. He denied entering the Miller's apartments, and assaulting them. He denied assaulting Kathy Harris.

18. Following the evidence and the arguments, Judge Stirba found defendant guilty of two counts of Aggravated Burglary and three counts of Assault.

19. Defendant was sentenced to prison on July 18, 2000.

20. After the proceedings, Mr. Montgomery interviewed Malena, without defendant and his wife present. He found that her testimony would not have helped defendant. Malena was also reluctant to testify since she was married at the time of the event and her testimony would expose her relationship with defendant.

21. Malena's testimony, proffered in his motion, was that Malena was in the apartment with defendant. She saw defendant leave and heard an argument in the hallway in which a woman and defendant both spoke with raised voices. She did not go into the hall or see whether defendant entered the Miller's apartment. She did say that after defendant returned, he did not leave the apartment any more that evening.

22. Defendant eventually fired Mr. Montgomery and then several other attorneys, one of whom filed the motion for a new trial. Before the motion was heard defendant waived further assistance of counsel and proceeded at the hearing on the motion, Pro se.

CONCLUSIONS OF LAW

1. Defendant's decision to waive the jury was a clear and informed choice. Defendant had the advise of counsel. He made a choice among alternatives and his decision was not unreasonable.

2. Ed Montgomery's concurrence in defendant's waive was a matter of trial strategy and not unreasonable.

3. Ed Montgomery's decision to withdraw the motion to sever was sound trial strategy given the decision to waive the jury since Judge Stirba was

informed, by the informations and the motion, of all the counts and the allegations upon with the counts were based.

4. There was not a legal basis to support a motion to suppress since defendant had consented to the search of his car for identification and the cigarette lighter that looked like a gun was found during that search.

5. Ed Montgomery's decision not to send notice of experts and call experts about the damage to the door was a reasonable trial strategy given the fact that the experts were conflicting and the inconsistencies in the Miller's statements were such that he could choose to impeach their testimonies more effectively.

6. Ed Montgomery's decision to not call witnesses about defendant's good character was sound trial strategy particularly because admission of good character in evidence would have allowed the State to introduce evidence of defendant's bad character.

7. Ed Montgomery was not ineffective in his assistance of defendant at trial.

8. The testimonies of the locksmiths are not new and previously unavailable evidence because the statements were known and available before the trial.

9. The testimony of Malena was not an "alibi" because she was not present during the argument and the assaults. Instead, her purported testimony, was merely cumulative of other evidence presented and therefore would not have changed the outcome of the trial.

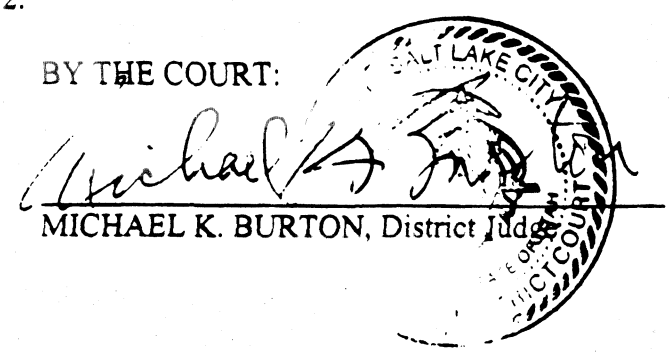
10. There are no grounds for granted defendant's motion for a new trial.

ORDER

Based upon the preceding Findings of Fact and Conclusions of Law, IT IS ORDERED that defendant's motion for a new trial is DENIED.

DATED this ~~11th~~ 12 day of ~~October~~ Nov, 2002.

BY THE COURT:



MICHAEL K. BURTON, District Judge

Approved as to form:

_____

Rehan Hassan, Pro se

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Findings Of Fact, Conclusions Of Law And Order was delivered to Pro Se, Attorney for Defendant Rehan Hassan, at P.O. Box 250, Salt Lake City, Utah 84020 on the 24th day of October, 2002.

Paula G. Lacton